In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-1321

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS, *Petitioner*,

vs.

CLARK-SCHWEBEL FIBERGLASS CORPORATION and BURLINGTON INDUSTRIES, INC., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Second Circuit

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Petitioner Carlyle Michelman, Trustee of Textura, Ltd. in Bankruptcy Proceedings, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 21, 1976, and which became final May 12, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is not yet reported. The memorandum of the District Court (Appendix B) is not reported.*

JURISDICTION

The decision of the Court of Appeals was filed April 21, 1976, and judgment entered that same day. That Court denied a timely petition for rehearing on May 12, 1976. †The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether it comports with Due Process for a Court of Appeals to take from a jury verdict-winner his verdict, wholly, explicitly, and strongly approved by the trial judge, without taking into account either the verdict-winner's theory of his case, or the evidence which the jury, and the trial judge, regarded as controlling.

2. Whether it is consistent with the Seventh Amendment for a Court of Appeals to strike down a jury's verdict, wholly, explicitly and strongly approved by the trial judge, without taking into account either the verdict-winner's theory of his case or the evidence which the jury, and the trial judge, regarded as controlling.

3. Whether a jury verdict, wholly, explicitly and strongly approved by the trial judge, may be struck down by a Court of Appeals under evidentiary circumstances such that the trial judge's determinations, if in the form of findings in a court-tried case, could not be set aside under FRCivP 52(a) because not clearly erroneous.

*In addition to the mentioned opinion and memorandum, Appendices A and B, there is also attached Appendix C: The special verdict answers of the jury to the questions put to it.

†The judgment and the order denying the petition for rehearing are attached at the end of Appendix A.

4. Whether standards of appellate review established by this Court are intolerably offended when a Court of Appeals strikes down a jury verdict, wholly, explicitly and strongly approved by the trial judge, without taking into account the verdict-winner's theory of his case or the essential evidentiary basis of the verdict, accepted by the jury and the trial judge as controlling.

5. Whether in view of the exigencies of judicial administration today, including calendar congestion at all appellate levels, and the obdurate refusal of appellate courts on occasion to abide constitutional and other restrictions on appellate supercession of jury verdicts which have been approved by trial judges, the time has come to formulate the rule that a jury verdict concurred in affirmatively by the trial judge, shall not be undermined on appeal on the sole ground that the facts do not sustain the verdict, at least in cases turning upon design, motive or intent.

6. Whether the striking down by a Court of Appeals of a jury's special verdict in an antitrust case, wholly, explicitly and strongly approved by the trial judge, without taking into account the verdict-winner's theory of his case or the essential evidentiary basis of the verdict, comports with this Court's administration of the antitrust laws.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

Amendment V provides in part:

> ***[nor shall any person] be deprived of life, liberty, or property, without due process of law;***

Amendment VII provides in part:

> ***and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Sec. 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. Sec.1 provides in part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal;***

Sec. 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Sec. 15 provides in part:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws*** shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Federal Rule of Civil Procedure 52(a) provides an analogously relevant rule:

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT OF THE CASE

Plaintiff, petitioner here, the trustee in bankruptcy of Textura, Ltd., recovered a verdict of $531,617 (before trebling) against two of three defendants, respondents here, for conspiracy to cut off supplies and credit to Textura, in violation of Sec. 1 of the Sherman Act, thus forcing Textura out of business (App. A, p. 3334).* (Other claims below, summarized in App. A, pp. 3335-3336, 3360 are not material to this petition.)

The District Court denied defendants' motions for directed verdict and j.n.o.v.; and in its accompanying memorandum, wholly, explicitly and strongly approved the jury's findings

*In referring to the Court of Appeals' opinion, App. A, the original pagination of the certified copy of that opinion has been retained. The trial court's memorandum, App. B, is separately paginated. All references to "Tr." indicate the pages of the complete transcript of trial court proceedings, which transcript was filed with the Court of Appeals. "Px." refers to "Plaintiff's Exhibit; and "Dx." to Defendant's Exhibit.

(App. B, pp. 2 ff.).

But the Court of Appeals, by drawing different inferences from selected items of evidence than had been drawn by the jury and trial judge, held that defendants' motions for j.n.o.v. should have been granted.

It is petitioner's position that in so holding, the Court of Appeals ignored the essential evidentiary basis of the verdict and failed to confront petitioner's theory of what the evidence establishes, which had been accepted by the jury and trial judge.

A. THE FACTS GIVING RISE TO THE ANTITRUST SUIT

The underlying facts, distilled from 2452 pages of trial transcript, once again tell the story of an independent American entrepreneur's plan to give a better product to more people for less money, a plan successful until wrecked by an antitrust conspiracy. Here, the entrepreneur is Malcolm G. Powrie, University of Minnesota Law School graduate, income tax attorney, X-FBI agent, successful businessman and innovative salesman [Tr.77].

For sales, production and other customary and legitimate business purposes, Powrie used several corporate forms: Glass Fabrics, Inc., Fenestra Fabrics, Inc. and Textura Ltd. (a California corporation). From December, 1964 on, Textura became the main corporate vehicle; and for brevity, Powrie/Textura are really mutual synonyms.

Powrie owned 50+% of Textura's stock. The only other stockholders were Vernes F. Grafstrom, a college/law school friend of Powrie [Tr. 1404] who joined the Shell Group of companies [Tr. 1403; 1427] and became president of Canadian Shell Ltd.; and Howard Porter, a California potato farmer/rancher [Tr. 1406], and relative of Powrie's wife. Grafstrom invested $115,000 [Tr. 1406], and Porter $81,000 [Tr. 1654]; and with Powrie, they were ready to finance the company's anticipated expansion [Tr. 1419].

PRODUCT AND SALES CONCEPT

The product of Powrie's dream was draperies woven from glass yarn. Called "fiberglass," this product was not popular with the decorators from an esthetic viewpoint; but it had important, offsetting mechanical properties (it would not burn, fade, stretch or shrink) [Tr. 82; 82A].

Powrie's ingenious sales approach involved three departures from the marketing customs of the glass fabrics industry of the '50's and '60's:

(1) After 6 years of concentrated research, Powrie developed a heat-shade factor for fiberglass [Tr. 88-90; 192-194; 346; 558-560; Px. 583]. This scientific breakthrough meant that for the first time ever, draperies could compete directly with Venetian blinds, the only product then on the market with sun shield data that architects and air conditioning engineers could fit into standard formulas to compute their gross tonnage requirements [Tr. 88]. Powrie's fiberglass window coverings could be accurately and mathematically engineered into high rise office buildings, hospitals, schools and other large commercial structures, opening up vast new market potentials for this promising new fabric [Px. 81: "Engineer's Guide," published in the journal of the American Society of Heating and Air Conditioning Engineers];

(2) Powrie alone, through his subcontractor in California, finished and colored his own draperies from griege goods (unfinished bolts of fiberglass) woven by the defendant mills [Tr. 95; 156; 195-196]; and

(3) These novel approaches permitted Powrie to sell directly to the owners of these large buildings at the "converter" price level, eliminating two traditional participants, the jobbers and interior decorators, each with its own price markup [Tr. 195; 196. Px. 587].

INFLEXIBLE FORMAT OF AN ANCIENT INDUSTRY

Powrie's marketing ideas and pricing methods cannot be appreciated as industry-shattering without some cursory knowledge of the rigid mold of the fabrics industry.

The textile business is one of the oldest in recorded history, the yarn always passing through many hands from animal hair or plant fiber to ultimate user. The distributing system that we know was imported lock, stock and loom from England; and before Powrie entered the picture, fabrics from glass were handled in the traditional flow through the marketplace, *with price markups at each step of the way [Tr. 195; 196]:*

1) *Owens Corning Fiberglas* (a small amount by Pittsburg Plate Glass) extruded the yarn from glass balls [T. 81] and sold it to the

2) *Weavers* (mills like defendants Clark-Schwebel Fiberglass Corporation; Burlington Industries, Inc.; J.P. Stevens & Company, Inc.) [Tr. 81; 82] who wove fabrics in large quantities (10,000 yards and up) in response to special orders from

3) *Converters* (purchasers from mills in large quantities) who sold to

4) *Jobbers* (wholesalers who purchased smaller lots from converters) [Tr. 82] who sold to

5) *Interior decorators* who sold to the

6) *User* (customer) [Tr. 196; 82].

Powrie through Textura was a converter; and he realized from the beginning that by eliminating jobbers and decorators, he was in direct violation of the textile industry's basic Commandment of "Never, never sell direct!" [Tr. 195-197; 116; 80]. To follow this ancient pricing tradition would have been comparable to forcing a building contractor to buy his structural steel from a local hardware store.

This bold confrontation led eventually to his financial ruin.

THE DEFENDANTS' DOMINANCE OF THE MARKETPLACE

For practical purposes, Owens Corning Fiberglas was the only source of yarn for Powrie's draperies in the entire United States [Tr.81]. Owens Corning Fiberglas sold yarn to the three defendants (Clark-Schwebel Fiberglass Corporation; Burlington Industries, Inc.; J.P. Stevens & Company, Inc.) who then wove 98% of all glass fabric materials available to Textura [Tr. 129; 1592].

Owens Corning was not only the source of virtually all fiber and technology in the glass fabrics field, they also supplied many of the executive personnel of the defendant weavers [Tr. 1726; 1729]. Further, there was considerable lateral movement of top managerial personnel amongst and between all three defendants. For example, Clark-Schwebel was formed in 1961, and managed by Ray Clark, formerly president of Burlington's fiberglass division (called Hess-Goldsmith); and Jack Schwebel, executive vice president of Clark-Schwebel, formerly headed the fiberglass division of J.P. Stevens [Tr. 883-886].

This incestuous cross-pollination of personnel [Tr. 1726] in the fiberglass industry seeped down as low as the sales level [Tr. 1344; 1357].

The totalitarian control of the entire fiberglass industry by the three defendants is evidenced by the fact that all these corporations and their principal officers were fined for price-fixing on December 3, 1964, in the case of *United States of America v. Burlington Industries et al* [Tr. 950; 1018; Px. 866].

DEFENDANTS INITIALLY SUPPORTED POWRIE'S DREAM

Initially, the defendants supported Powrie's new sales approach with enthusiasm. He called them his "partners," and over a period of 8-11 years, he developed friendships with their principal officers [Tr. 1794], met them socially on his monthly, or oftener, trips to New York, and kept them abreast of *every* detail of Textura's progress and development. (Burlington recommended Textura's outside accountants; and Textura told

these accountants to give all three defendants any information they wanted at any time [Tr. 122].

Powrie intrigued the defendants because he could:

(1) Lead them into the high rise, large commercial building market which no one else had tapped [Tr. 2176];

(2) Open up new sales potentials in the West Coast Market, 3,000 miles away from the Eastern center of the glass fabrics industry [Tr. 2176];

(3) Finish his own griege (raw) materials which gave the weaving mills substantially greater flexibility in their overall production schedules; and

(4) Place specific orders as far as two years in advance [Tr. 193; 194].

Because they saw Powrie as a new source of sales, the defendants offered him *two unusual concessions* as evidence of their cooperation [Tr. 2174-76]:

(1) Due to the time lag caused by shipping the griege 3,000 miles to the West Coast, Powrie's finishing his own fabrics, and Powrie's delays in getting paid as a subcontractor from either the prime contractor or the building owner [Px. 57], *all three defendants* gave him credit terms of 120 days instead of the usual 30 or 60 days [Tr. 164; 1816; 2174-2176]; and

(2) *All three defendants* agreed to hold Textura's woven orders in their warehouses without charge, *to deliver and bill Textura only when Powrie "called out" the fabric* [Tr. 92-111; 140-172; 154-158; 161-168; 1357-1358; 982; 2174; Px. 806; 55; 56; 57; 58; 146].

These deviations from industry practices became the heart beat of Textura's financial existence [Tr. 191;2174-2176]. All three defendants fully understood this; and *all three* followed these unusual terms scrupulously until March, 1966. Then, Clark-Schwebel abruptly terminated this well-established routine [Px. 104; 105; 108; 325], and induced Burlington and

J.P. Stevens to adopt similar collusive actions.

THE DREAM'S FRUITION

Textura experienced the usual growing pangs of any new and promising business. Its cash flow position was always pinched, although Grafstrom, Porter and Powrie put in cash as it was needed [Tr. 117]. It weathered a planned loss [Tr. 118] of some $113,000 in 1964, as it spread its offices and showrooms from the Los Angeles home base to San Francisco, Chicago and New York, and obtained sales representation in 20 other U.S. cities, as well as Sydney and Melbourne in Australia, and Mexico City [Tr. 115-116; 120; 208-214; 837].

1965 was a year of consolidation; the $113,000 loss of '64 was reduced to $30,000 [Px. 36]; and right on financial target, Textura averaged sales of $150,000 per month for the first quarter of 1966, with a net profit of $60,000 [Px. 39; Tr. 1814; 1812-1813].

DEFENDANTS' CREDIT PERSONNEL
OKAY TEXTURA'S CONDITION

Textura's rosy financial prospects were confirmed by the credit personnel of each defendant who apparently did not know what was going on in the minds of their respective superiors:

(1) In April, 1965, Schutz, head of Burlington's credit department, asked what he could do to help Powrie, after expressing his enthusiasm over Textura's financial promise [Tr. 740-741]. At Powrie's request, Schutz returned to New York and wrote on Textura's ledger sheet: "Do not charge this company interest on 120 day accounts" [Px. 806, pp. 9B, 10A; Tr. 732];

(2) As late as May, 1966, two different men in J.P. Stevens' credit department wrote two separate letters congratulating Textura on its excellent financial condition; and

(3) Clark-Schwebel was so confident of Textura's ability

to meet its obligations that it did not even ask for a financial statement for a full year (April 1, 1965 - March 31, 1966).

WHY DID THE DEFENDANTS TURN ON POWRIE?

Why?

How could it happen that the defendants turned viciously on Powrie and drove him into bankruptcy and financial ruin?

In the beginning, the defendants were so eager to get Powrie's sales volume and novel approaches that they looked the other way as he challenged the industry's unwritten rule, "Never, never sell direct!" They did not object to Powrie's elimination of two levels of price markup (the jobbers and interior decorators) which wiped out the system of price featherbedding.

Naturally, this change in the ancient marketing format did not sit well with the eliminated markup participants. They complained vigorously to Powrie [Tr. 195-201; 696-697], *and to all three defendants* about Powrie's "selling direct." These complaints roared louder as Powrie threatened the Eastern heartland of the glass fabrics industry by his expansions of 1964-65 [Tr. 201-203].

At an unusual luncheon, Colton (president of Burlington's Hess-Goldsmith division, Textura's principal supplier) told Powrie that if he had it to do over again, he would not sell to him; and if he could figure out a way to cut him off, he would stop selling to him [Tr. 202]. Burlington's vice president (Vollers) told Colton that, "If I stored those (the complaints about Powrie's pricing policies) in my mind, I don't think I have room for anything else." [Tr. 826].

The major complainants to the defendants were Powrie's rival converters, like Thortel Fireproof Fabrics, Ben Rose and Qual Fab. Qual Fab alone was buying fifteen times more glass fabrics from Burlington than Textura [Tr. 1828]; but all the converters felt threatened by Powrie's disturbance of this

ancient industry's vested pricing structures.

Vollers would subsequently testify that Colton ordered him to "do something about Textura." [Tr. 1826-29].

By this time, the defendants no longer needed Powrie, having leeched off all of his innovations:

(1) His heat-shade technology was now used throughout the glass fabrics industry; and

(2) His modernized sales techniques were well known; and they could be used "in the proper manner," which meant bringing the jobbers and decorators back into the happy glass fabrics monopoly.

The defendants were now ready to act; but how would they pull it off?

THE WEAPONS USED IN TEXTURA'S DESTRUCTION

It is important to remember that the principal conspiring actors were *not* regular credit men carrying out routine credit operations of their respective companies. To the contrary, they were chief executive officers [Tr. 1670; 1722-1723]:

John Wilson	
Vice Pres. Hess-Goldsmith (Burlington)	[Tr. 1630]
Jack Schwebel	
Vice Pres. Clark-Schwebel	[Tr. 883]
Raymond Clark	
Pres. Clark-Schwebel	[Tr. 883]
William Colton	
Pres. Hess-Goldsmith (Burlington)	[Tr. 1574-75]
Raymond Nordheim	
Vice Pres. Clark-Schwebel	[Tr. 1479-80]
Ludwig P. Vollers	
Vice Pres. Hess-Goldsmith (Burlington)	[Tr. 1574
Charles A. Kelly	
Vice Pres. Burlington	[Tr. 1839]

They, of course, enlisted the help of their credit men to create an illusion of a "legitimate exchange of credit information" between them.

Many of these top executives were sophisticated in the mechanics of price-fixing as is evidenced by their pleading nolo contendere to the price-fixing charges in 1964 in the U.S. District Court [Tr. 950; 1018; Px. 866].

To give their actions the appearance of legitimacy, the defendants fabricated a credit problem for Textura: In a conversation with Nordheim, Clark-Schwebel's vice president, Powrie said, " . . . tell me one more thing before we finally lock horns on this thing, this is not a credit problem is it, Ray, it is a quality problem. And he said no, Mal, it is not a credit problem." [Tr. 666-667].

Further, at the time of the defendants' concerted actions, Textura was in the best financial shape of its entire history: In 1965, for example, Textura's accounts payable to the three defendants totaled some $165,000; but by 1966, these accounts were only $50,000 [Px. 37; 38; 39; 40; 41]. General accounts payable fell from $329,000 to $113,000, and notes payable from $73,000 to $29,000 [Px. 37; 38; 39; 40; 41].

These, then, are the specific acts that killed a robust, burgeoning Textura:

(1) In March and April, 1966, Nordheim (Clark-Schwebel's Vice President) suddenly and without warning billed Textura for $80,000 of undelivered fabrics which Powrie had not "called out"; this was in direct violation of their long-time, continuing agreement [Tr. 301; 302; 303; 299; 305; Px. 104D; 824; 825];

(2) Although Nordheim admitted to Powrie that this $80,000 lot of fabrics was so defective [Tr. 1418] that it was "shit" [Tr. 284], he filed an inflated claim for $92,000 with the Textile Industry Arbitration Board [Tr. 32; Px. 131], agreeing with Powrie that this action would ruin Powrie's credit rating;

(3) He told Powrie frankly that he and the other defendants were out to "crucify" him [Tr. 319]; the $92,000

claim included unwoven yarns as well as unusable fabrics; the bulk of those fabrics were later sold by Clark-Schwebel as "junk";

(4) Clark-Schwebel terminated Textura's credit [Tr. 984], refused to process new orders [Px. 108], and stopped shipments to Textura [Px. 108];

(5) Burlington and J.P. Stevens demanded that Powrie settle the Clark-Schwebel claim as a condition of their selling him any more fabrics [Tr. 390-392; 397; 381; 382; Px. 141];

(6) Clark-Schwebel harassed Powrie to underwrite Textura's accounts with them by personal guarantees from Powrie [Tr. 1689; 369; 390-400; Px. 155], Mrs. Powrie [Tr. 738; 739; 740]; and stockholder Grafstrom [Tr. 1408-1409; 1418]; and all three defendants insisted on personal guarantees from Powrie and Mrs. Powrie [Tr. 314; 1689; 390-400; Px. 141];

(7) Burlington also, for the first and only time, delivered defective fabrics which Textura could not use for any purpose and which Burlington would not adjust [Tr. 408-409; 376-377];

(8) Burlington created chaos with Textura's contract commitments to its customers by starting to weave, then stopping work on Textura's orders [Tr. 853; 363; 367-368; 373; Px. 830];

(9) When Textura could not get its running pattern, "Morro," from Clark-Schwebel, Burlington accepted, then refused to weave "Morro"; and J.P. Stevens refused the order altogether [Tr. 300; 372-375; Px. 832; Px. 123];

(10) Burlington said it would desist in demanding Powrie's personal guarantee on Textura's orders if he signed a settlement agreement with Clark-Schwebel; but when Powrie signed this agreement, Burlington continued its demands for the personal guarantees from Powrie and Mrs. Powrie. (Powrie called credit man Schutz long distance on this matter, only to find out that Schutz already knew that Powrie had signed the Clark-Schwebel agreement, and to have Schutz say, "I want it (the personal guarantees) anyway!" [Tr. 400];

(11) Burlington arbitrarily rewrote Textura's order contracts, cancelling some, stretching out the delivery dates as much as six months on others, and reducing the quantities ordered, which made it impossible for Textura to fill its commitments to its customers [Tr. 401-406]. (Textura's shipments from Burlington dropped from 19,000 yards per month through July, to 3,000 afterwards [Px. 829];

(12) Burlington wove Textura's new 1967 catalogue line; but upon delivery, admitted that the materials were not to specifications [Tr. 408-409, 603-612];

(13) Clark-Schwebel, Burlington, and J.P. Stevens all demanded that Powrie pay each of them $1.50 for each $1.00 of new fabrics received, the overage to be applied against Textura's accounts payable [Tr. 462; 405; Px. 198; Tr. 489-489A; 490-491];

(14) Burlington stopped weaving Textura's two best-selling patterns, "Crown" [Tr. 346-347] and "Satin Boucle," [Tr. 360-369] on the ground that they no longer knew how to weave them, even though they had done so for the past 8 years [Tr. 347; 377; Px. 122] (66,000 yards of "Crown" were delivered January-June; thereafter, practically none [Px. 829; 537; Tr. 1625]);

(15) Burlington demanded that Textura stop finishing and coloring its own draperies (a selling and delivery disadvantage to Textura), as a condition of Burlington continuing to weave for Textura [Tr. 357; 358];

(16) Nordheim of Clark-Schwebel poisoned Textura's New York banker, L.F. Dommerich & Co. (who had been introduced to Textura initially by Burlington [Tr. 424; 1032]), by falsely telling its president that Powrie was milking Textura by taking $100,000 salary, living like a king on

company expenses, and diverting company-owned real estate to himself [Tr. 442-446]; L.F. Dommerich & Co. then cancelled its factoring agreement with Textura in August, 1966, [Tr. 453-461; Px. 835], even though L.F. Dommerich & Co. rated Textura a "satisfactory account" in June, 1966 [Px. 138; Tr. 1680-1681]: (Factoring is a routine, standard financial practice throughout the textile industry);

(17) Clark-Schwebel initiated an interest charge on Textura's account for the first time [Tr. 289; Px 822];

(18) Burlington reimposed the interest charges on Textura's account which they had voluntarily lifted in 1965 [Px. 806, pp. 9B, 10A];

(19) The officers of the three defendants harassed Powrie with innumerable telephone calls over a period of months, and repeatedly called him to New York for conferences, all of which interfered with his management of the company [Tr. 462-463], this at a time when Textura's gross sales should have been increasing in geometric progression, had Powrie been able to obtain his anticipated supply of glass fabric materials of usable quality.

DEFENDANTS' SUBSEQUENT POSITION

The defendant's collusive actions forced Textura into an assignment for benefit of creditors in November, 1966, and finally, bankruptcy in March, 1967.

As early as December (and possibly November), 1966, representatives of Burlington, Owens Corning and Menardi (Powrie's finishing subcontractor) were planning to replace Textura [Tr. 1471-72]. In January, 1967, Soft Flex Fabrics Inc. (a name previously used by Textura) was organized by Erskine (Burlington). Kahn (Owens Corning) and Gumbiner (Menardi) to provide an outlet for fabrics formerly marketed through Textura [Px. 884]. Soft Flex Fabrics eliminated Textura's sinful "direct selling" practices that Qual Fab and the other converters, jobbers and decorators found objectionable [Px. 228; Tr. 1360-1361; 1473-1475].

Equanimity in the pricing structure of the glass fabrics industry had been restored!

B. THE PROCEEDINGS IN THE DISTRICT COURT

Textura started its action on December 9, 1966, in the Southern District of New York. (Textura's trustee in bankruptcy, Carlyle Michelman, was later substituted as plaintiff).

The principal claim was that the three defendants, Clark-Schwebel, Burlington and Stevens, had conspired to restrain trade in the sale of fiberglass fabrics by driving Textura out of business. Suit was brought under Sec. 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 1, and Sec. 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Sec. 15. The acts complained of included the:

1) Restriction of credit on sales to Textura;
2) Withholding or delaying of deliveries to it;
3) Shipment of defective merchandise; and
4) Illegal inducement of its factor to terminate financing of its receivables.

There were other parties and claims in the District Court; but all were eliminated by dismissal, verdict or otherwise, except the Sherman Act Sec. 1 claim of Textura against Clark-Schwebel and Burlington, the respondents in this Court (App. A. pp. 3335-3336; 3360).

FOUR-WEEK TRIAL

The trial before District Judge Charles H. Tenney lasted four weeks; and the proceedings fill 2452 pages of transcript (App. A, p. 3334).

The jury deliberated four days [Tr. 2399; 2440], and returned a special verdict in reply to questions put to it.

JURY'S SPECIFIC FINDINGS

It found a conspiracy between Clark-Schwebel and Burlington to drive Textura out of business by any or all of the

following means:

1) Withdrawing, restricting or reducing the credit terms previously extended to Textura;

2) Lowering the quality of the merchandise previously sold to Textura;

3) Ceasing to deliver, refusing to weave, and refusing to sell any fabrics;

4) Modifying an arrangement under which the goods woven for Textura were held and not invoiced until called for delivery;

5) Coercing or forcing Textura to enter into a settlement agreement in connection with disputes it had with Clark-Schwebel; and

6) Modifying the policy regarding the adjustment of quality claims [Tr. 2447-48].

The jury further found that the conspiracy was a proximate cause for Textura's going out of business, and fixed damages (before trebling) of $521,617 [Tr. 2448]. The special verdict is set forth in its entirety in Appendix C.

TRIAL JUDGE SOLIDLY SUPPORTS JURY'S VERDICT

In his memorandum accompanying his order denying the Clark-Schwebel and Burlington motions for directed verdict and j.n.o.v., the trial judge stated:

> "Plaintiff has clearly demonstrated in his brief in opposition to the motions that there was sufficient evidence to support the jury's finding of a conspiracy and the Court is in complete agreement with that conclusion. There was sufficient evidence from which the jury could have reasonably found that Burlington and Clark-Schwebel took similar actions to restrict the credit terms on which they previously sold fiber glass fabrics to Textura and to restrict the availability of marketable fiber glass fabrics to it, all at a time when these defendants were in constant

> communication with each other, and that they knew that their joint actions would drive Textura out of business." (App. B, p. 2).

The Court then detailed the items of conspiracy which had been substantiated and proved by the evidence (App. B, pp. 2ff.).

AWARD OF ATTORNEYS FEES

Later, the trial judge entered an order for attorneys' fees for plaintiff's counsel of $325,000 (Order of September 9, 1975).

C. THE OPINION OF THE COURT OF APPEALS

It is Textura's position that the Court of Appeals not only misconstrues the evidence, but utterly fails to confront petitioner's theory of the case; it ignores altogether the most significant evidence found by the jury and the trial judge to control the issues.

Without marshalling Textura's proof, or summarizing it, the Court's opinion selects isolated fragments of evidence, draws therefrom inferences contrary to those drawn by jury and trial judge, and concludes that j.n.o.v. should have been granted.

Here are but a few examples of the opinion's utter failure to come to grips with the essential facts of the case:

(1) As part of its recitation of "the undisputed facts" [App. A, p. 3336], the Court of Appeals states [App. A, p. 3338];

> "Furthermore, while terms of the supplier's invoice required payment within 30 to 60 days, Textura rarely, if ever, met these terms; often it did not pay until 90 days or more after the invoice date, and on one occasion 140 days later."

This statement obviously paints a prejudicial picture of Textura as "slow pay."

Nowhere does the opinion even mention the equally "undisputed facts" that while the invoices were identical to those mailed to all the defendants' other customers, 120-day payments were arranged by careful agreement between Powrie/Textura and the defendants; and all parties recognized that such terms were the very basis of Textura's purchasing relationship with defendants (for over 13 years with Burlington and Stevens [Tr. 93-104; 140-175; Px. 52; 54; 3]; over 5 years with Clark-Schwebel* [Tr. 98; 105-110; Px. 55; 56; 59; 158; 167; 168]).

(2) The opinion [App. A, p.3339] recites that Textura sustained net losses of $113,788 in 1964 and $31,195 in 1965, to illustrate defendants' concern over Textura's ability to pay its bills. This is an apparent justification of defendants' destructive acts in 1966.

The Court of Appeals ignores entirely the "undisputed facts" that the 1964 loss was taken by design to expand the company nationally [Tr. 1406; Px. 875]; that the defendants knew in advance all about this expansion program; and that by 1966, Textura's financial condition was the strongest it had ever been. Sales and profits were on projected target:

	Sales 1966	Profits 1966	
Jan.	$150,014	$15,873	[Px. 37]
Feb.	$149,925	$17,946	[Px. 38]
Mar.	$150,659	$ 7,306	[Px. 39]
Apr.	$140,776	$ 6,982	[Px. 40]
May	$152,412	$10,636	[Px. 41]

Liabilities had been drastically reduced [Px. 37;38; 39; 40; 41]:

*Clark-Schwebel was not organized until 1961. Textura agreed to place orders with Clark-Schwebel only if Clark-Schwebel would give it the same 120-day credit terms it already had from Burlington and J.P. Stevens. To this, Clark-Schwebel readily agreed.

	Notes Owed
1965	$73,000
1966	$29,000
	General Payables
1965	$329,000
1966	$133,000
	Payables to Defendants
1965	$165,000
1966	$ 50,000

(3) In painting a picture of defendants' complete independence, one from the other, in their handling of Textura's Credit, the Court of Appeals opinion [App. A, p. 3341] states:

> "In fact Burlington did not even learn of Clark-Schwebel's termination of credit to Textura and the possible arbitration of the dispute until June 8, 1966."

This statement ignores the evidence contained in Burlington's own internal memo dated January 13, 1966, reporting a conversation between Kelly of Burlington and Nordheim of Clark-Schwebel where they "compare notes" on holding up shipments to Textura [Px. 96].

(4) Again, in an effort to show that Burlington acted independently of Clark-Schwebel, the Court of Appeals states [App. A, p. 3348]:

> "Thus, during the key period when Clark-Schwebel and Textura were engaged in their dispute, finally settled* on July 29, Burlington's shipments were, in five of seven months, higher than the 1965 average monthly shipment, and in the month of April, the month after the dispute between Textura and Clark-Schwebel had come to a head, its shipments were the

*As a matter of actual fact, this "dispute" was never, ever settled.

second highest monthly total in history to Textura. In all, Burlington's shipments during this period were at the rate of 35% more than the 1965 average."

That statement ignores the "undisputed facts" that by March, 1966, both Clark-Schwebel [Tr. 324-325] and Burlington [Tr. 1610-1611] had large quantities of goods stocked for Textura's account, woven from orders placed months earlier. Both Clark-Schwebel and Burlington would have preferred to empty their warehouses of Textura's goods immediately; but because of major quality defects, Clark-Schwebel could not do this. Burlington, on the other hand, did not have this grave quality problem, and continued to ship to Textura until it reduced its warehouse inventories.

The true test of Burlington's shipment performance, therefore, is the months of August, September, October and November when its shipments to Textura also fell drastically, for example, to zero yards in September [Px. 829]; [App. A, p. 3348-3349].

In the meantime, neither Clark-Schwebel [Tr. 1315; Px. 108] nor Burlington [Tr. 1614] were weaving *new* orders for Textura. This means that Clark-Schwebel and Burlington did terminate their acceptance of new orders from Textura at approximately the same time, after the conspiracy got under way.

The statement of the Court of Appeals is, therefore, a clear-cut distortion of the significant facts, due to its total failure to even confront the petitioner's evidence.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The historic mandate of the Seventh Amendment, that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law," and the modern admonition of FRCivP 52(a), that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" are not pious aspirations to be declared and then forgotten.

They are living principles for decent appellate review. They represent the crystallized psychological wisdom of the ages, that on-the-spot observation of human words and conduct is far more significant to the ascertainment of truth than reading a cold, printed transcript. See, e.g., *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S., 355, 358-59 (1962) (Seventh Amendment limitations); *Graver Tank & Mfg. v. Linde Air Products Co.*, 339 U.S. 605, 609-610 (1950) (FRCivP 52(a) limitations).

SPECIAL RESTRICTIONS OF CONSPIRACY CASES

No case more precisely invokes these restrictions on appellate review than a conspiracy case which, like the one at bar, uniquely turns upon human motivation:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949).

COURT OF APPEALS FAILED TO EVEN CONFRONT PETITIONER'S CASE

This case involves no mere misconstruction of the evidence. That would not justify certiorari.

Rather, it involves the total failure of the appellate court to confront the case made by petitioner, fully accepted by the jury's special verdict, and wholly, explicitly and strongly approved by the trial judge.

It involves an appellate court's ignoring of the evidentiary basis of such a verdict, so endorsed by the trial judge:

> "Plaintiff has clearly demonstrated . . . that there was sufficient evidence to support the jury's finding of a conspiracy and the Court is in *complete agreement with that conclusion*." (App. B, p. 2; emphasis added).

RADICAL DEPARTURE FROM ACCEPTED APPELLATE PROCEDURES

Without confronting Textura's theory of its case or essential proof in its support, the opinion of the Court of Appeals selects isolated items of evidence, draws inferences from them that are contrary to those drawn by jury and trial judge, and grandly concludes for j.n.o.v.

This is not appellate administration according to the accepted and casual course of judicial proceedings:

> "It hardly needs statement that the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *United States v. Patten*, 226 U.S. 525, 544 (1913); see also *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 699 (1962).

The opinion proceeds from the false assumption that Textura was a dead-beat whose defaults engendered natural independent reactions from two creditors, Clark-Schwebel and Burlington. The reality is that Textura's special credit terms were a matter of mutual agreement between Textura, Clark-

Schwebel and Burlington, prompted by the nature of the business and carried out over the years. These terms were drastically altered only because of continuous, increasing pressures from the defendants' other customers. Clark-Schwebel and Burlington then decided they had to get rid of Textura; and as both the jury and trial judge found, conspiratorily arranged to do so.

COURT OF APPEALS CASTS ASIDE RESPONDENTS' MOTIVATIONS

Utterly cast aside by the Court of Appeals are respondents' motivation and rewards for disposing of Powrie, accepted by jury and trial judge, as is shown by the opinion [App. A, p. 3359]:

> "In sum, the evidence does not reasonably support a finding of any motivation on Burlington's part to enter a conspiracy against Textura. This absence of a motive further undermines plaintiff's [petitioner's] suggested inference that Burlington's tightening of credit policy was prompted by agreement with Clark-Schwebel, rather than by its own business judgment."

Yet, as early as January 1967, representatives of Soft Flex Fabrics, (the company formed by Paul Erskine of Burlington and executives of the tightly-knit textile family) were in New York negotiating with both Clark-Schwebel and Burlington, for Textura's patterns and weave styles. Soft Flex Fabrics could be depended upon to "Never, never sell direct!"

The glass fabrics industry uses Powrie's heat-shield technology and selling methods.

The fiberglass establishment may, indeed, now gloat contentedly over its ability to cut off a maverick who had innovated new methods, and who threatened the industry's established pricing patterns.

The magnates have preserved their "thing!"

THIS COURT'S WATCHFULNESS FOR
PROCEDURAL UNFAIRNESS

This Court has been alert, under its Due Process obligations, to protect against the premature decision of claims before fair hearing at the trial court level. *Hovey v. Elliott,* 167 U.S. 409 (1897); *Societe Internationale v. Rogers,* 357 U.S. 197 (1958).

It is at least equally offensive to Due Process, and intolerably at odds with the Seventh Amendment, as well as the usual course of appellate proceedings, to undermine a claim vindicated by jury verdict and endorsed by the trial judge, without even confronting the verdict-winner's theory of the case, or the essential supporting evidence.

The method of the court below has, of course, produced a horrible injustice in the instant case; but for purposes of this petition, the significant thing is its radical departure from the norm of judicial administration.

DO WE NEED A MORE CRYSTALLIZED
RULE ON APPELLATE REVIEW?

Indeed, having regard for the current calendar pressures on the courts of appeals everywhere, there may be a serious question as to whether the time has come for this Court to crystallize our historical limitations on appellate review of facts into a more precise rule than has, up to now, been verbalized.

Perhaps better than a latitude that enables an appellate court to do what was done below, would be a rule that when a jury verdict is explicitly concurred in and approved by the trial judge, it will not be reversed on appeal on the sole ground that the facts do not sustain the verdict.

Of course, some mistakes in the administration of justice are inevitable, under any procedural method, so long as man remains fallible; but the frequency of error, and the probabilities of such flagrant ones as that below would seem less under the proposed rule than under the current approach. Now, an ap-

pellate court feels free to strike down verdicts approved by trial judges, on some vague instinct of superior prescience for knowing the truth.

Such a rule as the one proposed would seem of enhanced utility in cases turning upon design, motive and intent, as does this case.

Certainly, such a rule would tend to alleviate calendar pressures.

II
THE COURT OF APPEALS HAS RADICALLY DEPARTED FROM THIS COURT'S PRINCIPLES OF ADMINISTRATION OF THE ANTITRUST LAWS.

The flagrant way in which the Court of Appeals struck down the jury verdict, wholly, explicitly and strongly approved by the trial court, without even taking into account the conspiracy victim's theory of the case or his essential evidence, taken on a special significance in an antitrust context.

Under the Court of Appeals' approach, the protection of the antitrust laws dissipate at the whim of judges who did not see the witnesses, and who did not realistically experience the confrontation of judge, jury, parties and participants at trial, as did the trial judge.

This is not the principled method of antitrust administration which this Court has struggled to sustain:

Cf. *Continental Ore Co. v. Union Carbide Corp.,*
370 U.S. 690 (1962);

Klor's v. Broadway-Hale Stores,
359 U.S. 207 (1959);

Fashion Originators' Guild v. Federal Trade Commission,
312 U.S. 457 (1941).

If the antitrust laws are to continue to perform their function of helping to sustain American free enterprise, appellate courts must abide by the Seventh Amendment, and our other vindicated principles of reasonable deference to the triers of fact.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review the decision below.

Dated July 20, 1976.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals for the Second Circuit (dated April 21, 1976)

Judgment entered April 21, 1976

Order of the Court of Appeals denying petitioner's (plaintiff's) petition for rehearing (dated May 12, 1976)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 588, 663, 664, 665—September Term, 1975.

(Argued January 15, 1976 Decided April 21, 1976.)

Docket Nos. 75-7332, 75-7593, 75-7594, 75-7598

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS,

Plaintiff-Appellee,

—against—

CLARK-SCHWEBEL FIBER GLASS CORPORATION,

—and—

BURLINGTON INDUSTRIES, INC.,

Defendants-Appellants.

Before:

LUMBARD, SMITH and MANSFIELD,

Circuit Judges.

Appeal from a judgment entered after a jury trial before Charles H. Tenney, *Judge,* in the United States District Court for the Southern District of New York, finding that appellants violated §1 of the Sherman Act, 15 U.S.C. §1, by conspiring to cut off supplies of goods and credit to Textura, Ltd.

Reversed.

HALIBURTON FALES, 2d, Esq., New York, N.Y. (Thomas McGanney, Esq., J. Michael Brown, Esq., White & Case, New York, N.Y., of counsel), *for Defendant-Appellant Clark-Schwebel Fiber Glass Corporation.*

DONALD L. HARDISON, Esq., Washington, D.C. (Robert W. Devos, Jr., Esq., Bergson, Borkland, Margolis & Adler, Washington, D.C., of counsel), *for Defendant-Appellant Burlington Industries, Inc.*

HOWARD BREINDEL, Esq., New York, N.Y. (Wells Burgess, Esq., Robert Aronson, Esq., Regan Goldfarb Heller Wetzler & Quinn, New York, N.Y., of counsel), *for Plaintiff-Appellee.*

MANSFIELD, *Circuit Judge:*

Unraveling the complexities of an antitrust case usually places a heavy burden on all concerned, and perhaps the greatest on the finder of the facts. After a four-week trial before Charles H. Tenney, *Judge,* of this private antitrust suit for $9,750,000 treble damages under §4 of the Clayton Act, 15 U.S.C. §15, by the trustee in bankruptcy of Textura, Ltd. ("Textura"), the jury returned a verdict of $531,617 damages (before trebling) in the plaintiff's favor upon the claim that defendants-appellants, Clark-Schwebel Fiber Glass Corporation ("Clark-Schwebel") and Burlington Industries, Inc. ("Burlington") had violated §1 of the Sherman Act, 15 U.S.C. §1, by conspiring to cut off supplies and credit to Textura, thus forcing it out of business. Although the verdict was the product of four days of jury deliberation we are satisfied that, even when the evidence is viewed most

favorably to the plaintiff, the verdict cannot be upheld. Accordingly, we must conclude that the defendants' motions for a directed verdict and judgment notwithstanding the verdict should have been granted.

The action was begun on December 9, 1966, in the Southern District of New York by Textura, Ltd. (for which its trustee in bankruptcy, Carlyle Michelman, was later substituted), its wholly-owned subsidiary Fenesta Fabrics, Inc. and Malcolm G. Powrie, majority shareholder and principal officer of Textura, against Clark-Schwebel, Burlington and J. P. Stevens & Co., Inc. ("Stevens"). Textura, a converter of decorative fiber glass fabrics into draperies, alleged that the defendants, who were suppliers of such fabrics, had conspired in violation of §1 of the Sherman Act, 15 U.S.C. §1, to restrain trade in the sale of such fabrics by using various means to drive Textura out of business, including the restriction of credit on sales to it, the withholding or delaying of deliveries to it, the shipment of defective merchandise to it and the inducement of its factor, L. F. Dommerich & Co. (which was named as a co-conspirator) to terminate financing of its receivables. In addition to this claim, the trial of which forms the basis of the present appeal, Textura also claimed that in refusing to extend credit to it the defendants had discriminated against it in violation of the Robinson-Patman Act, 15 U.S.C. §§13(a) and (e), that the defendants had unlawfully fixed prices of decorative and industrial fiber glass fabrics and that they had monopolized and attempted to monopolize trade and commerce in fiber glass industrial fabrics in violation of §2 of the Sherman Act, 15 U.S.C. §2.

Trial of the action was begun on October 15, 1974, before Judge Tenney and a jury. At the close of the plaintiff's case the court directed a verdict for the defendants on the decorative fabrics price-fixing claim and the plaintiff vol-

untarily dropped the Robinson-Patman Act and monopolization claims. Answering written questions, the jury found that there was a conspiracy between Clark-Schwebel and Burlington to drive Textura out of business but rendered a verdict on that claim in favor of Stevens, which it found not to be a member. It awarded $531,617 single damages to Textura against Clark-Schwebel and Burlington. In addition it rendered a total verdict of $99.56 single damages in favor of Textura against Burlington and Stevens on the industrial fiber glass fabric price-fixing claim. The claims of Powrie and Fenesta Fabrics Inc. were dismissed.

The district court denied defendants' motions made during trial for a directed verdict and their post-verdict motions for judgment notwithstanding the verdict, which were based upon the contention that the evidence was insufficient to support an inference of conspiracy to drive Textura out of business. Upon this appeal the two appellants advance this same contention as the principal ground for reversal. They also seek reversal on the ground that Textura failed to prove that it suffered any damages as a result of the alleged conspiracy or that any such damages were caused by the defendants. In the alternative they seek a new trial because of errors claimed to have been committed in the conduct of the trial.

The Facts

A short outline of the undisputed facts with respect to the history of Textura and its dealings with the defendants is essential to our review and analysis of the record. Though Textura's predecessor was formed in 1954,[1] the

1 The predecessor, known as Glass Fabrics Inc., transferred its assets to Textura in 1965. For convenience, we shall refer to both companies as Textura.

company operated on only a small scale until 1958, when Malcolm G. Powrie, Textura's president, decided to step up the company's operations. Textura's primary business consisted of purchasing bulk fiber glass fabrics from three suppliers—Clark-Schwebel, Burlington and Stevens—and converting the fabrics into finished draperies, which were then sold for use as window drapes.

Textura's method of operation represented an innovation in this area. Previously, owners of large office buildings had purchased only venetian blinds as window coverings; those tenants who desired drapes had to buy the drapes themselves on a piecemeal basis. Textura pioneered the bulk sale of fiber glass drapes directly to building owners for use in an entire building, thereby eliminating the need for venetian blinds. Generally, Textura attempted to obtain a specification for use of one of its exclusive fabric styles from the owner of a new building as it was being planned. If successful, Textura would then install the drapes at a later point, sometimes more than two years thereafter, when construction of the building had been completed.

Textura faced obstacles in developing this new method of selling fiber glass drapes. One difficulty arose from the fact that engineering data concerning the effect of venetian blinds on a building's heating and air conditioning requirements were well developed, while similar data concerning fiber glass drapes did not exist. Building owners were thus reluctant to buy drapes rather than venetian blinds because of the difficulty in computing how much heating and air conditioning they might then require. To cope with this problem, Textura engaged heating engineers to develop the relevant data for fiber glass drapes. This research, for which Textura received financial aid from Clark-Schwebel and others, took several years and culmi-

nated in the publication of a booklet in early 1965 to be used as a marketing tool in convincing reluctant building owners to buy drapes rather than venetian blinds.

Another difficulty arose from the long delay between Textura's making of a contract to install drapes in a building and the actual installation and receipt of payment by it. To avoid the necessity of financing large amounts of inventory during this period, Textura asked for and received special arrangements from each of the three companies, Burlington, Clark-Schwebel and Stevens, which supplied the bulk fiber glass fabrics used in its draperies.[2] While none of these arrangements was ever reduced to writing, Textura was informally allowed to place bulk orders for fabrics with the supplier, which would then weave the fabrics, and hold them in its inventory until Textura called for them. The fabrics were generally held by the supplier for some months, and in some instances, for a year or more before Textura called for delivery and was billed for them by the supplier. Since Textura paid no interest for this investment in inventory, it thus gained a benefit not enjoyed by other customers. Furthermore, while the terms of the supplier's invoice required payment within 30 or 60 days, Textura rarely, if ever, met these terms; often it did not pay until 90 days or more after the invoice date, and on one occasion 140 days later. For the most part, Textura was apparently not charged interest on these overdue bills.

Over the years each supplier periodically would press Textura to "call out" fabrics sooner, and to speed up its

2 Plaintiff suggests that the existence of these "identical credit arrangements" which Textura had long enjoyed with its three major suppliers indicates that those companies were following a "common credit policy" toward Textura even before the period of the alleged conspiracy. Aside from the fact that the arrangements were only similar, not identical, the record clearly shows that the similarity arose from Powrie's request for such arrangements from each of Textura's suppliers.

payments for fabrics already delivered. However, their methods of trying to obtain prompter payment varied. In 1963, for instance, which was long prior to the alleged conspiracy, Raymond P. Nordheim, Vice President of Clark-Schwebel, wrote Powrie in June, October, and December, asking him to send payments on Textura's account. Burlington, on the other hand, asked Powrie and other stockholders of Textura on various occasions (1957, 1958, 1962 and 1964) to guarantee personally payment of the firm's debts. However, Powrie refused to give such a guarantee.

Until 1964, Textura had operated primarily in California, and had achieved some success in that market; the company showed net profits of $40,091 in 1962, and $49,285 in 1963. However, in 1964, when Textura expanded its sales operations and staff throughout the nation, the expenses involved in this expansion took their toll on the company which, according to the testimony of Powrie, its President, was always a thinly financed company. Textura experienced net losses of $113,788 in 1964 (characterized as "staggering" by Powrie), and $31,195 in 1965 (which made Textura's financial statement look "horrible" according to Powrie). It reported a negative working capital in both years,[3] indicating an extremely shaky financial condition.

Textura's financial reverses created increasing concern among its suppliers about payment of Textura's outstanding bills. Each supplier, however, adopted an independent approach to the problem. In early 1965, Burlington succeeded in obtaining from Powrie a personal guarantee, effective until the end of 1965, and an agreement to try

3 The working capital deficit amounted to $98,650 as of December 31, 1964, and to $50,906 as of December 31, 1965.

to keep Textura's account within 90-day limits and to work toward even prompter payment than that.

Stevens and Clark-Schwebel adopted different measures. In April, 1965, Stevens put a flat $10,000 limit on the credit it would advance to Textura, and demanded that the latter pay bills outstanding in excess of that amount. Clark-Schwebel, during the early part of the year, prodded Textura, sometimes with humor, to speed up its payments,[4] but as 1965 drew to a close, its attitude toughened. Clark-Schwebel began charging Textura interest on accounts more than 30 days old, and finally, on December 27, took the drastic step of holding up further shipments of fabric to Textura "until this matter is straightened out." Textura also pressed complaints of its own against Clark-Schwebel during the year; it repeatedly notified Clark-Schwebel that it had received defective fabrics, and unsuccessfully asked the latter to make appropriate adjustments.[5]

It is against this undisputed background that we turn to 1966, the year of the alleged conspiracy. The principal events relied upon by Textura begin on March 1, 1966. During the first two months of 1966. Textura had made some payments on its account with Clark-Schwebel, and the latter company made some fabric shipments to Textura. The dispute over the quality of fabrics shipped by Clark-Schwebel remained unresolved, however, and on February 27, Textura brought the matter to a head by notifying Clark-Schwebel that it was taking a $30,000

4 On February 25, 1965, Nordheim of Clark-Schwebel wrote Powrie of Textura outlining the past due bills of Textura. "We would appreciate it enormously if you would take the time to look into the 'exchequer' and send us some of your loot," Nordheim's letter stated. (Def. Ex. T)

5 While Textura had difficulties with the quality of the fabrics received from all three suppliers, Powrie testified that his difficulties with Clark-Schwebel were the greatest, because that company, unlike Burlington and Stevens, did not make satisfactory adjustments when Textura raised claims about the quality of fabrics delivered.

credit on its bills as an offset for damages claimed to have been sustained because of the defective fabrics. This action was contrary to the terms of the contract between the parties, which required arbitration of such disputes. On March 1, Clark-Schwebel retaliated by (1) billing Textura approximately $92,000 for all the fabrics manufactured pursuant to Textura's orders and held in inventory but not yet called out by Textura, (2) refusing to extend credit, and (3) demanding immediate payment of all the outstanding invoices.

Attempts to reach an informal settlement of the dispute were fruitless, and on June 9, Clark-Schwebel initiated a formal arbitration proceeding. There is no evidence that Burlington was involved in Clark-Schwebel's decisions to bill Textura for the fabrics and to take the dispute to arbitration. In fact Burlington did not even learn of Clark-Schwebel's termination of credit to Textura and the possible arbitration of the dispute until June 8, 1966.

The exchange of salvos on February 27 and March 1 virtually ended normal commercial relations between Textura and Clark-Schwebel. While Clark-Schwebel made some shipments of fabric to Textura later in 1966, it did so only for immediate cash payment, and the total shipments amounted to only a small percentage of the previous year's shipments. On July 29 the two companies agreed to settle their dispute, Textura undertaking to accept delivery of and pay cash for $70,000 of the warehoused goods during the next three months, after which it would receive a $12,000 credit as an adjustment of its quality claims. Powrie testified that he told Clark-Schwebel that the terms of the agreement were impossible, and he accepted them only because he had no choice. However, the agreement was later modified at Textura's request and still that company failed to perform it, making only one $5,000 payment during the rest of the year.

Turning to Textura's relations with Burlington in 1966, the personal guarantee which Powrie had executed for Burlington expired on December 31, 1965. On January 5, 1966, Burlington requested a renewal for the year 1966 but Powrie resisted or stalled and the request was unsuccessfully renewed several times during the early part of the year. Despite the refusal to sign the guarantee, however, Burlington, unlike Clark-Schwebel, continued to ship goods on credit to Textura in large quantities through July. Although Burlington held up credit approval of some new orders placed by Textura in March and April, which resulted in certain fabrics (e.g., "Crown") becoming temporarily unavailable to Textura in August and September, it later accepted these orders and another order placed in May to replace some of the fabrics Clark-Schwebel had refused to weave for Textura. Burlington actually wove a large amount of one fabric, "Homespun," previously made for Textura by Clark-Schwebel prior to the breakdown in their relations.

As Powrie later conceded, the news that Clark-Schwebel was putting into arbitration a claim of approximately $90,000 against Textura would, in view of its poor financial condition, naturally tend to make others wary about extending credit to Textura, since a decision in favor of Clark-Schwebel could put Textura in bankruptcy. After the arbitration was filed Burlington renewed its request to Powrie for a personal guarantee of Textura's debts. Stevens also requested a guarantee. However, no such guarantee was given. Although Burlington's shipments to Textura plunged during August and September because of Burlington's delay in approving the new orders placed in March and April, shipments from Burlington rose in October and November as a result of Burlington's later decision to accept the new orders and to continue shipping

goods to Textura without a personal guarantee. In return Textura agreed to work to keep its account within 60-day terms. During the period following Clark-Schwebel's filing of the arbitration proceeding, officials of Clark-Schwebel and Burlington discussed in a series of telephone conversations the progress of the Textura-Clark-Schwebel settlement negotiations and other factors relating to Textura's financial stability.

One other blow received by Textura during 1966 deserves mention. Textura depended on its factor, L. F. Dommerich, Inc. to bolster its cash flow by purchasing its accounts receivable. Sometime during the summer of 1966 Dommerich decided to terminate its factoring agreement, and in preparation for that step, built up large cash reserves of approximately $84,000 against Textura's account in July and August of that year, thereby depriving Textura of badly needed cash. Dommerich's notice of termination was sent on August 10, to be effective October 10. The reasons for Dommerich's decision to terminate Textura do not appear on the record, but there is no evidence that the appellants were involved in that decision.[6]

The termination of the factoring agreement appears to have sealed Textura's fate. Though Dommerich relented to the extent of continuing its factoring operations for Textura into December, Textura's efforts to find another factor did not succeed, and on December 15, 1966, Textura filed an assignment for the benefit of creditors.

Further facts relating to the conspiracy claim will be discussed below in our consideration of the parties' contentions.

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6 During the trial Judge Tenney observed that there had been no proof that Dommerich had participated in the alleged conspiracy. Interpreting this as a ruling, the defendants refrained from offering evidence to the effect that Dommerich had terminated its agreement with Textura because of what it considered to be fraud on Textura's part in attempting to obtain advances on undue invoices.

The Law

In considering appellants' contention that the evidence was insufficient to support plaintiff's conspiracy claim, the scope of our review power is narrow. We are "bound to view the evidence in the light most favorable to [the plaintiff] and to give [him] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962). To do otherwise would displace the jury from its proper role as the finder of fact and deny plaintiff his right to trial by jury. If, however, after viewing all the evidence most favorably to plaintiff, we cannot say that the jury could reasonably have returned the verdict in his favor, our duty is to reverse the judgment below. The jury's role as the finder of fact does not entitle it to return a verdict based only on confusion, speculation or prejudice; its verdict must be reasonably based on evidence presented at trial.

The central issue in this case is whether the proof fairly supports the finding of an unlawful agreement between Burlington and Clark-Schwebel. If it shows at best merely that the two firms acted independently, each exercising its own business judgment in its dealings with Textura, then the verdict cannot stand. The Sherman Act's prohibition of "every contract, combination, or conspiracy" in restraint of trade does not forbid a supplier from independently deciding to refuse to do business with another, no matter how harmful that decision may be to the latter. Section 1 "does not prohibit independent business actions and decisions. A person still has the right to refuse to do business with another, provided he acts independently, and not pursuant to an unlawful understanding, tacit or expressed." *Modern Home Institute Inc.* v. *Hartford Accident and In-*

demnity Co., 513 F.2d 102, 108 (2d Cir. 1975). If, on the other hand, there was evidence, viewed most favorably to the plaintiff, which would indicate an agreement existed between the appellants to cut off Textura from goods and credit, this agreement could not be defended as a reasonable restraint of trade under the doctrine of *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911). Because of its inherently anti-competitive nature, a group boycott of the type alleged here is unreasonable *per se*, and thus always illegal. See, e.g., *Klor's Inc.* v. *Broadway-Hale Stores Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America* v. *FTC*, 312 U.S. 457 (1941).

Since conspiracies, whether among businessmen or others, are rarely evidenced by explicit agreements, the determination of whether a conspiracy existed almost inevitably rests on the inferences that may fairly be drawn from the behavior of the alleged conspirators. At a minimum, their actions, to support a finding of a conspiracy, must suggest a commitment to a common end. "[T]he circumstances [must be] such as to warrant a jury in finding that the conspirators had a unity of purpose, or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946).

Applying these principles here the evidence, viewed most favorably to the plaintiff, fails to provide any reasonable ground for a finding of any agreement or plan, tacit or otherwise, to restrain Textura's trade or to achieve any of the unlawful objectives claimed by the plaintiff, such as to cut off supplies or credit to Textura, to drive it out of business, to ship it defective goods, or to put pressure on it to accede to Clark-Schwebel's demands. The record, on the contrary, reveals at most independent efforts by each of three suppliers lawfully to continue doing business with

a customer which was in a financially precarious condition on terms that would protect the supplier from ending up unable to obtain payment for goods supplied. Each pursued a substantially dissimilar and divergent course from the others in its effort to achieve this objective; each was, however, ultimately unsuccessful in obtaining payment of all of Textura's indebtedness to it.

The dissimilarity between the conduct of the two defendants in their dealings with Textura extended to such basic matters as their willingness to ship goods on credit to Textura, the credit policy terms of each toward Textura, and the adjustment of quality claims. The evidence with respect to these matters not only fails to provide any basis for a finding of conspiracy, it reveals conduct that is diametrically opposed to and inconsistent with any such combination or agreement. For example, when Clark-Schwebel refused to accept orders to ship goods on credit to Textura, Burlington not only shipped goods in record amounts to Textura on credit but even accepted and filled orders for some of the very goods cut off by Clark-Schwebel. To be sure, Burlington did take some steps to assure that its advances of credit to Textura would be repaid, but all the evidence indicates that those steps were solely the result of Burlington's own assessment of Textura's financial position, and not the product of a conspiracy with Clark-Schwebel. Given this failure to show evidence probative of a conspiracy, the verdict cannot stand.

The Shipment of Goods by Clark-Schwebel and Burlington to Textura

The radical difference between Clark-Schwebel's and Burlington's treatment of Textura during the alleged conspiracy is illustrated, first of all, by the pattern of their

1966 shipments to that company. In 1965, before the conspiracy is alleged to have begun, Clark-Schwebel shipped an average of $11,200 per month of fabrics to Textura.[7] During the first seven months of 1966 (the period when Textura unilaterally asserted a $30,000 credit on its bill owed to Clark-Schwebel, prompting the latter to retaliate by putting Textura on a cash basis and billing it for warehoused goods, which led to the arbitration proceeding that was settled on July 29) the monthly dollar value of Clark-Schwebel's shipments was as follows:

January	$8,809.72
February	5,092.05
March	None
April	None
May	5,596.18
June	8,132.20
July	478.95

All shipments after March 1 were COD (Def. Ex. CK).

Thus Clark-Schwebel drastically cut its sales to Textura as a result of its dispute with that company, shipping no fabric at all in two months (March and April) and an insignificant amount in one month (July). Two other months (February and May) saw shipments of about 50% of the 1965 months average, and only in the remaining two months did the shipments reach roughly 80% of that average.

Had Burlington and Clark-Schwebel been conspiring to coerce Textura into accepting Clark-Schwebel's demands, one would expect Burlington's shipments to be reduced similarly, thereby increasing the pressure on Textura to settle its dispute with Clark-Schwebel on terms unfavor-

7 The total 1965 shipments amounted to $134,506. (Pl. Ex. 884).

able to Textura. However, on the contrary, Burlington's shipments to Textura increased substantially during this period over comparable 1965 figures. The average monthly yardage shipped to Textura by Burlington in 1965 was 14,100 yards of fabric.[8] The shipments (in yards) for the first seven months of 1966 were as follows:

January	15,672
February	15,759
March	17,110
April	45,585
May	14,833
June	12,670
July	11,686

(Pl. Ex. 829)

Thus, during the key period when Clark-Schwebel and Textura were engaged in their dispute, finally settled on July 29, Burlington's shipments were, in five of seven months, higher than the 1965 average monthly shipment, and in the month of April, the month after the dispute between Textura and Clark-Schwebel had come to a head, its shipments were the second highest monthly total in history to Textura. In all, Burlington's shipments during this period were at a rate of 35% more than the 1965 average. Only in June and July did Burlington's shipments fall below the 1965 average, and even then only to 83% of that average. Moreover, even during June and July, Burlington continued to ship the fabric style

8 Burlington's total 1965 shipments to Textura amounted to 169,225 yards of fabric, and ranged from a monthly low of 9,041 yards in April to a high of 23,363 yards in September. (Pl. Ex. 829). The record does not show the dollar value of Burlington's monthly shipments, as it does for Clark-Schwebel, but there is no reason to believe that this difference results in any distortion of the year-to-year record of each company.

"Crown," which Powrie testified was an especially important style for Textura, at a rate between two and three times that of the 1965 average rate.[9]

It was only in August, *after* the settlement agreement between Clark-Schwebel and Textura had been reached, that Burlington's shipments took a downward plunge, ranging as follows during the last four full months of Textura's existence:

August	4,207
September	–0–
October	3,339
November	7,299

(Pl. Ex. 829)

It is undisputed that the primary reason for this latter decline—and particularly for the near drought of shipments of the key "Crown" fabric in the August to October period—was Burlington's temporary failure earlier in the year to accept new orders placed by Textura. Plaintiff suggests that this failure was part of the conspiracy, the effects of which did not become evident until some months after Clark-Schwebel's actions took their toll. However, this claim is unsupported. Indeed, the history of the orders

9 In 1965 Burlington shipped a total of 54,222 yards of "Crown" to Textura, for an average of roughly 4,500 yards a month. The shipments (in yards) of "Crown" for the first seven months of 1966 were as follows:

January	8,176
February	5,410
March	4,882
April	14,662
May	11,240
June	10,886
July	11,009

(Pl. Ex. 829)

and later events negates it. The orders, most important of which was for "Crown," were placed by Textura in March and April of 1966. It is clear that by May 18, 1966, Burlington's credit department had placed a "hold" on the orders, meaning that Burlington would not accept them for the time being.[10] However, this was more than three weeks prior to the first of a series of alleged "conspiratorial" conversations between Burlington and Clark-Schwebel (discussed below) which occurred on June 8. There is no evidence of collaboration on the part of Burlington prior to June 8 and certainly not as early as May 18. No conspiratorial significance, therefore, can be attached to this "hold."

The record, furthermore, is clear that Burlington alone made the decision to hold up approval of the new orders, and for its own independent reasons: at this point it was actively seeking a renewal of its personal guarantee from Powrie, and felt that he was reneging on a previous promise to give the guarantee. It cannot be disputed that he was rebuffing Burlington's efforts to obtain the guarantee at this point, and, indeed, on May 18 he wrote a letter to Burlington asking it to forego the guarantee because of an improvement in Textura's position. After the dispute between Textura and Clark-Schwebel was settled and Powrie had agreed to keep Textura's payments to Burlington

10 Plaintiff suggests the evidence supports the inference that the orders were actually held up by Burlington's sales department, not its credit department, and thus the hold was part of the conspiracy. One bit of evidence cited in this regard—a memo from Jack Cann, a Burlington credit official, to a sales official (Pl. Ex. 147)—is only a request for a clarification of the status of the "Crown" contract. Similarly, the statement by another Burlington credit official that the sales department had told the credit department that weaving on "Crown" was suspended indicates only that the sales department had continued weaving the fabric for a period, even without credit approval of the new contract, a fact which is confirmed by other portions of the evidence. (E.g., Def. Ex. BN).

within 60-day terms, the orders in question were accepted in late August, although in reduced amounts. In October and November, Burlington resumed shipments in increasing amounts to Textura, although the shipments did not reach the 1965 levels.

In sum, the record of the 1966 shipments by Burlington and Clark-Schwebel to Textura not only fails to support the claim of conspiracy but points in the opposite direction. The two companies followed wholly different policies in their sales of fabrics to Textura. Burlington had developed its policy long prior to the period of the alleged conspiracy and did nothing to change it in response to Clark-Schwebel's switch to a harder line. Indeed, Burlington's large shipments in the spring and summer would tend to undercut Clark-Schwebel's position.

Burlington took a further step which was the antithesis of conspiratorial conduct: on May 11, 1966, after Clark-Schwebel had in early March refused to weave new contracts for Textura, Textura placed an order with Burlington for a fabric style ("Homespun") which Textura had previously obtained exclusively from Clark-Schwebel. Burlington later accepted the order and wove 25,000 yards of the fabric.[11] Plaintiff, however, suggests that the poor resemblance of this woven fabric to the Clark-Schwebel product is itself evidence of a conspiracy, presumably implying that Burlington must have agreed with Clark-Schwebel to weave this fabric poorly in order to assure that Textura would not receive an adequate substitute for the "Homespun" which Clark-Schwebel would no longer provide.

11 Textura also placed an order for another style ("Morro") formerly woven by Clark-Schwebel. While Burlington never wove any more than a small sample of this order, the reason is completely unclear. Mr. Powrie testified that "Morro" "kind of faded out of the picture" (Tr. 375), which is the only conclusion the evidence supports on the fate of the order.

While we must give the plaintiff the benefit of every reasonable inference, this argument leaps from inference into unbounded speculation, particularly in view of the fact that, when the quality problem with "Homespun" became evident, Burlington did not attempt to force the inferior fabric on Textura or otherwise use the contract as a tool to harass that company. Rather, it agreed to void the contract or, alternatively, to sell the fabric to Textura at a closeout price of 75 cents a yard, as opposed to the 96 cents a yard contract price. The only reasonable inference which can be drawn from this episode is that Burlington was not conspiring with Clark-Schwebel, but was rather taking advantage of that company's dispute with Textura to try to capture some business previously enjoyed by Clark-Schwebel. That the expenditure involved in weaving "Homespun" ultimately proved to be wasted reflects on Burlington's technical abilities, but not on its motives for entering the transaction.

Burlington's willingness to make adjustments on the defective "Homespun" was not unusual; the company's attitude on quality complaints by Textura again stands in sharp contrast to Clark-Schwebel's position. While Clark-Schwebel's refusal to make what Textura deemed adequate adjustments of its quality complaints was a major factor precipitating the dispute between those two companies, Powrie testified that Burlington had been consistently more reasonable in making adjustments for defective fabrics. Textura does appear to have pressed quality complaints against Burlington with greater frequency in 1966 than previously, but the record does not support plaintiff's contention that Burlington decided to put Textura out of business because of the increase in complaints. On the contrary, by Powrie's own testimony, Burlington offered him satisfactory quality adjustments on various fabrics as late as December of 1966.

Credit Policies Toward Textura

The credit policies of Burlington and Clark-Schwebel toward Textura likewise fail to support an inference of conspiracy. Not only did the credit policies of each supplier differ substantially but there is no evidence indicating that they were mutually formulated or invoked. In April 1965, long prior to the period of the alleged conspiracy, Burlington established its policy toward Textura, which was to continue to weave and warehouse orders without invoicing until the goods were called out and to extend credit on 90-day payment terms on invoiced goods, provided it had Mr. Powrie's personal guarantee. There is no evidence that Clark-Schwebel was involved in that decision, which was detailed in a contemporaneous memorandum (Def. Ex. BB) and confirmed by later 1965 memoranda.

Although Burlington took some steps to tighten its credit advances to Textura in 1966, the evidence shows that these actions were the result of Burlington's independent judgment and not the product of any conspiracy with Clark-Schwebel. Upon learning of Textura's reported loss for the year 1965 Burlington, beginning on January 5, 1966, and continuing from time to time throughout the year, unsuccessfully sought from Powrie a renewal of his personal guarantee. However, there is no evidence that these efforts were the result of any understanding with Clark-Schwebel. The fact that Burlington's efforts to obtain the guarantee continued in 1966 after Clark-Schwebel sought arbitration of its dispute with Textura hardly supports the existence of any collaboration between Burlington and Clark-Schwebel. As of May 31, 1966, some 10 days before the arbitration was filed, even Textura's unaudited internal figures showed the company had net working capi-

tal of only some $43,000;[12] Clark-Schwebel's claim in arbitration was for $92,000, thus raising the distinct possibility that the arbitration proceeding could be the final blow collapsing Textura's admittedly thin financial structure.

Powrie himself conceded in his testimony that he worried about the effect of a dispute of this size upon his creditors, and had hesitated to bring an arbitration against Clark-Schwebel for that very reason: "Anything having to do with a $90,000 dispute against my company would have an effect [on its credit] no matter who brought it." (Tr. 665). The only conclusion that can be drawn is that it was reasonable for Burlington, in its own self-interest as a creditor, to worry about the arbitration, and to ask for a guarantee as a step to protect itself against Textura's possible bankruptcy.[13] See *Hallmark Industry* v. *Reynolds Metals Co.*, 489 F.2d 8, 13-14 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974). Even assuming that the Burlington request for a guarantee could be considered parallel with Clark-Schwebel's earlier cut-off of credit that step, being in Burlington's individual economic interest, could not, without more, raise an inference of conspiracy. See *Modern Home Institute Inc.* v. *Hartford Accident & Indemnity Co., supra*, 513 F.2d at 110; Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658-59, 681 (1962).

12 The accuracy of these financial statements, which showed Textura made a net profit of $58,743.63 during the first five months of 1966, was disputed at trial, since Textura's bookkeeper admitted that sales made after the close of a period were sometimes booked during the period. The bookkeeper denied at trial that this was done as a policy to help Textura meet its goal of $150,000 a month in sales. A deposition in which she had previously admitted such a policy existed was read into the record. Since we must view the evidence most favorably to the plaintiff, we accept the financial statements at their face value.

13 None of the communications between Burlington and Clark-Schwebel contained any express request or suggestion by Clark-Schwebel that Burlington demand a guarantee. Nor, for reasons to be discussed *infra*, can the communications be regarded as an implicit suggestion of joint action.

For present purposes it is significant that, despite Burlington's increased efforts to get paid, which were natural and hardly conspiratorial under the circumstances, it continued for most of 1966 to weave and warehouse goods for Textura at its own risk, without invoicing Textura until the goods were called out, and except for occasional brief periods when it put Textura on cash terms,[14] to extend 60-day credit to Textura on invoiced goods. In contrast, beginning on March 1, 1966, and continuing through the rest of the year Clark-Schwebel refused to weave or sell on credit to Textura, it refused to ship except for cash and it billed Textura for all specially manufactured goods already held in inventory. Far from indicating any conspiracy to pursue common credit policies designed to drive Textura out of business, the picture is just the opposite, with one creditor (Clark-Schwebel) adopting a procrustean policy while the other (Burlington) sought through leniency to capture some of the business being given up by the first.

Communications Between Burlington and Clark-Schwebel

Plaintiff relies heavily on a series of telephone calls, primarily between Raymond Nordheim, Vice President of Clark-Schwebel, and Charles Kelly, an official in Bur-

14 Powrie himself testified that Burlington put Textura on cash terms only for brief periods (Tr. 652-53, 698-99). Menardi & Co., another firm with which Textura dealt, also put Textura on a cash basis in 1966. (Tr. 699-700). Menardi is not alleged to have been a member of the conspiracy.

lington's credit department,[15] as evidencing a "classic conspiracy." It is argued that these conversations, which we have summarized in the margin[16] could reasonably be interpreted by the jury as tacit invitations by Clark-Schwebel to Burlington to join in a coordinated credit policy toward Textura. We disagree. The exchange of information between business firms concerning the credit-worthiness of customers has long been held not to violate the Sherman Act. See *Cement Manufacturers Protective Association* v. *United States*, 268 U.S. 588, 604 (1925). Unlike exchanges regarding prices, which usually serve no purpose other than to suppress competition and hence fall within the ban of the Sherman Act, see *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969), the dissemination to competitors of information concerning the credit-worthiness of customers aids sellers in gaining information necessary to protect themselves against fraudulent or insolvent customers. See *id.* at 335; *Cement Manufacturers Protective Assn.* v. *United States, supra*, 268 U.S. at 604. Given the legitimate function of such data, it is not a violation of §1 to exchange such information, provided that any action taken in reliance upon it is the result of each firm's independent judgment, and not of agreement.

The conversations concerning Textura do not support any inference that Clark-Schwebel and Burlington stepped beyond these permissible boundaries. The subject which bulked largest in the conversations—the progress of the arbitration proceeding—was a key factor in assessing Tex-

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15 There was also evidence about other conversations between the pair before the conspiracy allegedly began. These conversations are also merely exchanges of credit information, and do not support the finding of a conspiracy.

16 In the first telephone call, which occurred on June 8, 1966, Nordheim told Kelly that Clark-Schwebel was having "considerable difficulties" with Textura, which owed them $87,000 and was being held to cash terms. Nordheim further described Textura as a "difficult and contentious" account because of the allegedly insubstantiated quality claims made, and indicated that Clark-Schwebel was thinking of submitting its disputes with Textura to arbitration. The day after this conversation Clark-Schwebel filed its arbitration demand. On June 30, some three weeks after the arbitration demand had been filed, Nordheim went into greater detail with Kelly about the dispute between Clark-Schwebel and Textura, indicating that the two companies were attempting to reach a settlement under which Textura would take delivery of and pay for warehoused goods over an extended period. Nordheim said Clark-Schwebel intended to be "very cooperative" and would accept any kind of "reasonable" delivery schedule. Nordheim also passed along information about a separate issue which had worried Textura's creditors for some time: the actual value of the rights to a process carried on Textura's balance sheet at $200,000. Nordheim said the item was worthless, since the owner of the process had cancelled his agreement with Textura.

In early July, 1966, Jack Schwebel, President of Clark-Schwebel, brought Kelly up-to-date about the development of the dispute between Clark-Schwebel and Textura, advising that Clark-Schwebel was no longer accepting orders from Textura. Kelly informed Schwebel that Burlington was requesting a personal guarantee from Powrie because of the arbitration proceeding.

In two conversations later in July, Nordheim advised Kelly that Clark-Schwebel was anxious to avoid proceeding with the arbitration, and would accept any reasonable settlement, but that Textura had thus far rejected their offers. Nordheim concluded the latter conversation by saying that if Clark-Schwebel was forced to proceed with the arbitration, it was confident of victory, and if victory was gained, Clark-Schwebel would "no longer be in the mood to compromise and will insist on immediate payment, which may very well bankrupt the account." For obvious reasons, this worried Kelly, who noted in his memorandum that "this matter should be taken into consideration in any further extension of credit on our part."

However, the next brief telephone call from Nordheim—*made at Powrie's request*—brought the news that a settlement had been agreed upon. The final conversation between Kelly and Nordheim took place on September 6, after Textura had defaulted on payments due to Clark-Schwebel. Nordheim informed Kelly of that fact, which prompted him to check and see if Textura had kept up its payments to Burlington. Finding that Textura had also defaulted on payments to his company, Kelly then ordered shipments held up until Textura was current in its obligations to Burlington. He also initiated inquiries with Textura's accountant to get more details about the company's current financial condition.

tura's future financial stability. While plaintiff points to testimony by Nordheim that he made the calls to Burlington to "protect" Clark-Schwebel, no such intention was expressly or tacitly communicated to Burlington. At most the evidence of the talks indicates that, once or twice, Nordheim expressed some irritation at Textura's attitude. Viewed most favorably to the plaintiff, the conversations reveal that, while Clark-Schwebel told Burlington that its dispute with Textura could conceivably lead to a weakening of Textura's financial condition, with possible serious repercussions for both Burlington and Clark-Schwebel as creditors, Clark-Schwebel was offering concessions that it hoped would lead to settlement, which is exactly what happened. We cannot find these conversations, viewed with or without the balance of the evidence, sufficient to support the verdict.

The Other Evidence

We have carefully reviewed the other evidence advanced at trial in support of the conspiracy claim, and find it cannot fairly be viewed as raising an inference of a conspiracy. The isolated statement of a Burlington official in 1964, two years before the alleged conspiracy, that he would be happier if Burlington did not deal with Textura, cannot be construed as an admission of participation in a conspiracy not claimed to have begun until years later, particularly in view of the fact that Burlington continued to do business with Textura up until the time of the latter's bankruptcy. Cf. *Scott Medical Supply Co.* v. *Bedsole Surgical Supplies Inc.*, 488 F.2d 934, 936 (4th Cir. 1974). Similarly, the complaints from Textura's competitors,[17] which are suggested as Burlington's

17 The companies in question were jobbers of fabrics. It might be questioned how significant the competition between these firms and

motive for entering the conspiracy, were of long standing, yet Burlington had continued to deal with Textura for years. The suggestion that they suddenly provided a motive for Burlington to destroy Textura in 1966 thus ranks as utter speculation, see *Carbon Steel Products Corp.* v. *Alan Wood Steel Co.*, 289 F. Supp. 584, 588 (S.D.N.Y. 1968), especially since Burlington made no effort to coerce Textura into stopping the marketing methods which allegedly gave rise to the complaints. Cf. *Plastic Packaging Materials Inc.* v. *Dow Chemical Co.*, 327 F. Supp. 213, 228 (E.D. Pa. 1971). In sum, the evidence does not reasonably support a finding of any motivation on Burlington's part to enter a conspiracy against Textura. This absence of a motive further undermines plaintiff's suggested inference that Burlington's tightening of credit policy toward Textura was prompted by agreement with Clark-Schwebel, rather than by its own business judgment. See *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 287 (1968); *Venzie Corp.* v. *United States Mineral Products Co.*, 521 F.2d 1309, 1314-15 (3d Cir. 1975).

Our discussion of those portions of the proof emphasized by the parties does not mean that we have limited ourselves to pieces of the mosaic without viewing the evidentiary picture as a whole. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra*, 370 U.S. at 698-99. But even when the evidence is viewed as a whole, the picture is not even dimly one of conspiracy. In view of this conclusion, we find it unnecessary to rule upon appellants' contentions that there was insufficient evidence that their conduct caused Textura to cease business and that the award of damages was

Textura was, since plaintiff himself introduced considerable evidence to show that Textura had profited by entering a market previously occupied by venetian blind manufacturers.

therefore based on speculation rather than on proof. Similarly, we need not pass upon appellants' claims of error regarding the conduct of the trial.

The judgment based upon the alleged conspiracy to drive Textura out of business is reversed, with instructions to enter judgment for the defendants on this claim. In view of this disposition the appeal and cross-appeal from the district court's award of attorneys' fees in Docket Nos. 75-7593, 75-7954 are dismissed as moot.

(A true copy.
A. Daniel Fusaro
Clerk

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United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of April one thousand nine hundred and seventy-six.

Present:

HON. J. EDWARD LUMBARD

HON. J. JOSEPH SMITH

HON. WALTER R. MANSFIELD

Circuit Judges,

Carlyle Michelman, Trustee of Textura, Ltd., in Bankruptcy Proceedings, Fenestra Fabrics Inc., and Malcolm G. Powrie, Plaintiffs-Appellees v. Clark Schwebel Fiber Glass Corp., Burlington Industries Inc., and J.P. Stevens & Company, Inc., Defendants Clark Schwebel Fiber Glass Corp., Burlington Industries, Inc., Defendants-Appellants.	75-7332 75-7593 75-7594 75-7598

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District

of New York , and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

It is further ordered, adjudged and decreed that the appeals from the judgment of the said District Court awarding attorney's fees be and they hereby are dismissed as moot.

A true copy.

A. DANIEL FUSARO
Clerk

By Chief Deputy Clerk

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States House, in the City of New York, on the 12th day of May, one thousand nine hundred and seventy-six.

Present:

HON. WALTER R. MANSFIELD,
HON. J. JOSEPH SMITH,
HON. J. EDWARD LUMBARD,

Circuit Judges.

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., IN BANKRUPTCY PROCEEDINGS, FENESTRA FABRICS INC. AND MALCOLM G. POWRIE,
Plaintiffs-Appellees
v.
CLARK SCHWEBEL FIBER GLASS CORP., ETC.,
Defendants
CLARK SCHWEBEL FIBER GLASS CORP.,
BURLINGTON INDUSTRIES INC.,
Defendants-Appellants

A petition for a rehearing having been filed herein by counsel for the appellee

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk

APPENDIX B

Trial judge's memorandum opinion denying respondents' (defendants') motion for a j.n.o.v./directed verdict

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

66 Civ. 4230 (CHT)

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., IN BANKRUPTCY PROCEEDINGS, FENESTRA FABRICS, INC. and MALCOLM G. POWRIE,

Plantiffs,

– against –

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC.,

Defendants

MEMORANDUM

TENNEY, J.

Following the conclusion of a lengthy trial, in which a jury returned a verdict for plaintiff, Carlyle Michelman, Trustee in Bankruptcy of Textura, Ltd. ("Textura"), in the sum of $531,617.00 against Clark-Schwebel Fiber Glass Corporation ("Clark-Schwebel") and Burlington Industries, Inc. ("Burlington") and a nominal verdict against J. P. Stevens & Company, Inc. ("Stevens"), defendants Clark-Schwebel and Burlington have moved for relief from that judgment. In addition, an unsuccessful plaintiff, Malcolm G. Powrie, has moved for a new trial. Finally, plaintiff Michelman has moved for an award of counsel fees. These motions will be discussed **seriatim**.

Motions by defendants Clark-Schwebel and Burlington: (1) renewed motion for a directed verdict under Rule 50(a); (2) motion for judgment N.O.V. under Rule 50(b); and (3) motion for a new trial under Rule 59

The grounds for the motions are: (1) that plaintiff Michelman failed to present sufficient evidence from which the

jury could have found in his (Textura's) favor and that, accordingly, judgment in favor of the defendants notwithstanding the verdict ("N.O.V.") should be granted; (2) that the verdict is against the weight of the evidence; and (3) that there were errors in the charge and in the conduct of the trial, for which a new trial is requested.

Plaintiff has clearly demonstrated in his brief in opposition to the motions that there was sufficient evidence to support the jury's finding of a conspiracy and the Court is in complete agreement with that conclusion. There was sufficient evidence from which the jury could have reasonably found that Burlington and Clark-Schwebel took similar actions to restrict the credit terms on which they previously sold fiber glass fabrics to Textura and to restrict the availability of marketable fiber glass fabrics to it, all at a time when these defendants were in constant communication with each other, and that they knew that their joint actions would drive Textura out of business.

Defendants rely heavily upon the contention that plaintiff's proof fails to meet the criteria necessary for the doctrine of conscious parallelism to apply here. Again, it should be noted that plaintiff has met those criteria by establishing evidence of **similar** or **parallel** conduct – not identical and contemporaneous conduct, which are the criteria urged by defandants. Plaintiff has shown restrictions of Textura's credit, cessation of deliveries, refusals to process orders, demands for personal guarantees, all of which were effected in apparent contradiction to defandants' self-interest and all of which could have been deemed rational only if the other parties to the conspiracy had agreed to act in a similar manner. Variations as to the time actions were taken and methods used to accomplish the purpose of the conspiracy are of little aid to defendants, particularly since plaintiff need not rely on the doctrine of conscious parallelism alone; plaintiff proffered evidence of motive, constant contact and communication between defendants at the time of their similar, if not identical, restrictive conduct, as well as admissions and threats. Likewise, there was sufficient evidence from which the jury could have reasonably found that defendants' conspiracy was the proximate cause of Textura's damage and to support the jury's award.

Defendants' charge of error in the Court's instructions to the jury regarding "conscious parallelism" and "exchange of information" suffers from the same defects as does their argument as to the insufficiency of the evidence of a conspiracy. On the basis of the instructions given to the jury and the form of the verdict submitted to it, the Court cannot conceive how the jury could have been misled as to the requisite elements of proof of a conspiracy under applicable anti-trust law. Defendants' claim that instructions requested by them were erroneously not given by the Court presupposes that the requests were legally supportable, which they were not.

With one exception, the remaining charges made by defendants in connection with the conduct of the trial do not merit serious discussion. However, the Court believes it should respond to the charge that it unexpectedly limited the summation of defendants Burlington and Clark-Schwebel. This charge is an egregious distortion of the facts. In the first place, it had been agreed by the Court and all counsel that Jay H. Topkis, Esq., appearing on behalf of Stevens, would wield the "laboring oar" throughout the trial on behalf of all three defendants. One has only to examine the transcript to see that this procedure was followed.

On November 6, 1974 plaintiffs rested and defendants advised the Court that their case would be "quite brief" and "at the outside, two days" (Transcript [Tr.] 1942). The balance of the day was devoted to argument of a motion to dismiss the complaint, conducted by Mr. Topkis "on behalf of all three defendants." Neither Burlington's nor Clark-Schwebel's counsel requested that he be heard, although the Court inquired whether anybody else had anything to add (Tr. 1991).

On the following morning, November 7, the Court asked how long summations would be since – in view of the fact that defendants had then indicated that they intended to call only one witness and introduce some documentary evidence – the Court assumed that the summations could be concluded on that day (Tr. 2004). Wells D. Burgess, Esq., counsel for both plaintiffs, indicated that he hoped plaintiffs' summation could be concluded in one hour. No estimate was given by defendants as to the time they would require. During the luncheon recess, due to a personal emergency, the Court was obliged to leave, but requested the Chief Judge to adjourn the case until the following morning. Since defendants wished to conclude with

their sole witness, the Chief Judge presided over the trial during the afternoon of November 7 in accordance with the stipulation of the parties (Tr. 2068-69). At the conclusion of that witness' testimony, the jury was excused until November 11. The Chief Judge indicated that summations and instructions should be completed in one day. Again, Mr. Burgess indicated that he would need one hour. When the Chief Judge inquired whether anybody objected to one hour, Mr. Topkis replied "That's fine for us, your honor." (Tr. 2139-40).

On November 11, the Court having returned, defendants offered additional evidence and then rested (Tr. 2147-55). Thereafter, in the robing room, the Court ruled on the various requests to charge and indicated its hope that summations could be completed and the jury instructed on that date (Tr. 2156). Mr. Topkis commenced his summation "on behalf of all three of the defendants, and with particular reference to the only one that I represent, namely, J. P. Stevens . . . ." (Tr. 2168). Mr. Topkis was still summing up when the luncheon recess was called, at which time he requested another 25 minutes even though he had already exceeded the one hour allotted. When the Court inquired whether the other defendants were going to sum up too, Donald L. Hardison, Esq., counsel for Burlington, replied "Briefly." (Tr. 2207). Thomas McGanney, Esq., counsel for Clark-Schwebel, did not respond.

Mr. Topkis continued his summation after the luncheon recess. Then, Mr. McGanney commenced his summation, although at the luncheon recess, he had not indicated any intention to sum up at all. His opening remark to the jury is interesting: "I am not going to repeat what Mr. Topkis has said but I do want to say a few things specifically about my client, Clark-Schwebel." (Tr. 2229). After he had spoken for about ten minutes, the Court advised Mr. McGanney that it would give him "about two minutes more." (Tr. 2235). In response, Mr. McGanney said that he "would like to say one thing, just about the quality disputes, as Mr. Topkis suggested I might mention it." He then proceeded to do so and made no request for additional time.

Mr. Hardison, the last of the three defense counsel to speak to the jury, then summed up on behalf of Burlington, opening

with the gratuitous statement that the "pressure is on me to be brief." (Tr. 2237). At no time did the Court attempt to limit the length of his argument.

After a short recess, Mr. Burgess commenced his summation, noting, "We have heard at great length from defendants in this action, **some two hours and ten minutes' worth.**" (Tr. 2250) (Emphasis added). Plaintiffs' summation, according to defendants, consumed approximately the same time. On one occasion, plaintiffs' counsel was advised by the Court that he had already consumed over one hour and a half, and he indicated he would attempt "to wrap this up very quickly." When he had concluded, the Court asked defendants' counsel whether they had "any brief rebuttal" and Mr. Topkis replied "Under five minutes. I will make it three." Neither of the other defense counsel responded. (Tr. 2322-23). After Mr. Topkis had completed his rebuttal, the jury was excused as it was then too late for the Court to give its charge as it had originally intended. Thereafter, in the robing room, no claim was ever made that the Court had improperly limited summation by any party. The simple fact is that defense counsel had grossly exceeded the time allotted – a fact which both Mr. McGanney and Mr. Hardison were aware of when they rose to speak.

For the above-stated reasons, defendants' motions are denied.

Plaintiff Powrie's motion for a new trial pursuant to Rule 59

Plaintiff Powrie contends, although his counsel did not request such a charge and only raised an objection after the charge had been completed, that the Court erred in failing to instruct the jury that the burden of proof was on defendants to show Powrie's failure to mitigate in connection with his claim for damages resulting from lost salary. Powrie speculates that the jury may have found, by less than a preponderance of the evidence, that, although Powrie suffered damages, he failed to mitigate properly. Such speculation ignores the fact that the only evidence on mitigation showed that Powrie did in fact

mitigate (thereby suffering no damage). There was no evidence as to failure to mitigate and the jury could not possibly have been misled by the instruction, at another point in the charge, with respect to the meaning of the term "preponderance of the evidence." Plaintiff Powrie's motion for a new trial is denied.

Plaintiff's Motion for an Award of Attorneys' Fees

Plaintiff Michelman, on behalf of Textura, has moved for an order awarding him a reasonable attorneys' fee as provided in Section 4 of the Clayton Act, 15 U.S.C. § 15. Defendants Clark-Schwebel and Burlington have requested an evidentiary hearing. Defendants contend that plaintiff's attorneys did not break down their time and charges to defendants' satisfaction and did not substantiate the hours allegedly devoted to this case.

Accordingly, the Court will hold an evidentiary hearing in connection with the application for fees. Defendants, upon reasonable notice, shall be afforded ample opportunity and time to review the time records of plaintiff's attorneys. Plaintiff may apply to the Court, on a proper showing, for leave to pursue such limited discovery of defendants and their counsel as the law permits.

The parties shall advise the Court when all such discovery has been completed, but in no event shall the period of discovery exceed thirty (30) days from the date hereof. The Court will then fix a date for the evidentiary hearing.

It is so ordered.

Dated: New York, New York
May 2, 1975

U.S.D.J.

APPENDIX C

Trial transcript's report of the special interrogatories to the jury, and the jury's answers

(At 2:55 p.m. The jury took its place in the jury box)

THE CLERK: Members of the jury, listen to your verdict:

"A. Conspiring to drive plaintiffs out of business.

"1. Was there a conspiracy between two or more persons or corporations to drive Textura out of business by any or all of the following means:

"– by withdrawing, restricting or reducing the credit terms previously extended to Textura

"– by lowering the quality of the merchandise that any defendant or defendants had previously sold to Textura.

"– by ceasing to deliver any fabric

"– by refusing to weave any fabric

"– by refusing to sell any fabric

"– by modifying any arrangement under which the goods woven for Textura were held and not invoiced until called for delivery

"– by coercing or forcing Textura to enter into a settlement in connection with disputes it had with Clark-Schwebel, or

"– by modifying policy regarding the adjustment of quality claims."

Your answer is "Yes."

"2. If your answer to question 1 is Yes, which of the defendants was involved in the conspiracy? Answer yes or no for each defendant.

"Burlington?"

Your answer is, "Yes."

"Clark-Schwebel?"

Your answer is, "Yes."

"J. P. Stevens?"

Your answer is, "No."

"3. Was the conspiracy a proximate cause for Textura going out of business?"

Your answer is, "Yes."

"4. If your answer to question 1 is Yes and your answer to question 3 is Yes, what damages, if any, did Textura sustain as a result of the conspiracy? Give a dollar amount or 'none.' "

Your answer is $531,617.

"5. If your answer to question 1 is Yes, did plaintiff Powrie

sustain any damages as a result of the conspiracy which he could not have avoided by using reasonable efforts?"

Your answer is, "No."

"6. If your answer to question 5 is Yes, what unavoidable damages, if any, did Powrie sustain? Give a dollar amount or 'none'."

Your answer is none.

"B. Conspiring to fix prices on industrial fiberglass fabrics.

"1. It has been stipulated that between 1956 and late 1962 the defendants fixed prices on first-grade ('firsts') industrial fiber glass fabrics. On June 27, 1960, Glass Fabrics purchased $448.06 worth of industrial fabric 'firsts' from J. P. Stevens, and on July 15, 1965 and August 25, 1965, Textura purchased a total of $1,543.27 worth of industrial fabric 'firsts' from Burlington.

"Had the prices of these particular industrial fabrics been fixed? Answer yes or no for each of the following:

"(a) Industrial fabric purchased by Glass Fabrics from J. P. Stevens on June 27, 1960."

And your answer is, "Yes."

"(b) Industrial fabric purchased by Textura from Burlington on July 15, 1965 and August 25, 1965."

Your answer is, "Yes."

"2. If your answer to either (a) or (b) of question 1 of this Part is Yes, what damages were sustained as a result of the price-fixing on the particular fabric purchased? Give a dollar amount or 'none' for each of the following:

"(a) Damages sustained by Glass Fabrics on purchase of industrial fabric from J. P. Stevens on June 27, 1960."

Your answer is, $22.40.

"(b) Damages sustained by Textura on purchase of industrial fabric from Burlington on July 15, 1965 and August 25, 1965."

Your answer is, $77.16.

"C. Counterclaims.

"1. Has any plaintiff or Grafstrom intentionally made a false representation of any material fact to any defendant which was relied upon by that defendant?"

Your answer is, "No."

(The jury was polled by the clerk.)

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-132

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS,

Petitioner,

vs.

CLARK-SCHWEBEL FIBER GLASS CORPORATION and BURLINGTON INDUSTRIES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT CLARK-SCHWEBEL FIBER GLASS CORPORATION IN OPPOSITION

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BRIEF FOR RESPONDENT CLARK-SCHWEBEL FIBER GLASS CORPORATION IN OPPOSITION

Preliminary Statement

This brief is filed in opposition to the Petition for a Writ of Certiorari, filed by Carlyle Michelman, Trustee of Textura, Ltd. in Bankruptcy Proceedings, on July 20, 1976. An extension of time to file this brief until September 10, 1976, was granted to respondent Clark-Schwebel Fiber Glass Corporation ("Clark-Schwebel").

Opinion Below

The opinion of the Court of Appeals is now reported at 534 F.2d 1036.

Questions Presented

1. Whether this Court should review the judgment of the Court below when petitioner does not question the substantive principles of antitrust laws adopted by the unanimous Court of Appeals.

2. Whether this Court should review the judgment of the Court below in order to determine whether that Court's unanimous decision, explained in a twenty-seven page opinion with detailed factual analysis of the record, that the District Court should have granted defendants' motion for a directed verdict and judgment *n.o.v.*, was correct.

3. Whether this Court should review the judgment below in order to overturn traditional standards of appellate review, explicitly reaffirmed by this Court as recently as 1967 (*Neely* v. *Eby Construction Co.*, 386 U.S. 317), and substitute a rule that a Court of Appeals should not exercise its full supervisory function when a District Court has denied a motion for judgment *n.o.v.*

Statutory Provision Involved

Section 2106 of Title 28 provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Statement of the Case

While the opinion of Mansfield, C. J., writing for an unanimous court, provides a comprehensive statement of the case, we set forth below an abbreviated factual statement in order to put into proper context certain assertions made by petitioner.

Textura was, in 1965 and 1966, prior to its assignment for the benefit of creditors and subsequent bankruptcy, engaged in the business of converting decorative fiber glass fabrics and other decorative fabrics into draperies for installation in office buildings and homes. Its operating head and plaintiffs' principal witness at trial was Malcolm G. Powrie.

Defendants Burlington Industries, Inc. ("Burlington"), J.P. Stevens and Company ("Stevens") and Clark-Schwebel were the principal suppliers of decorative fiber glass fabrics to Textura during the period in suit (Tr. 122-24).* While Burlington and Stevens are large diversified textile concerns, Clark-Schwebel's sole business is in the weaving of fiber glass fabrics, for both industrial and decorative uses (Tr. 885-86). Its comparative size is re-

* References to "Tr." are to the trial transcript; to "App. A" and "App. B", to the Appendices attached to the Petition for a Writ of Certiorari; and to "PX" and "DX", to plaintiffs' and defendants' exhibits respectively.

flected, *inter alia,* in the fact that Clark-Schwebel did not have a credit department (Tr. 1137) and its President, Mr. Jack Schwebel, and the head of its Decorative Fabric Division, Mr. Ray Nordheim, acted as a *de facto* credit department regarding the matter in suit.

Petitioner describes at length Textura's alleged innovative method of selling direct to business contractors, bypassing traditional middlemen (Pet. pp. 6-10). The Court of Appeals was fully aware of this aspect of Textura's business, which it describes in two pages of its opinion (App. A 3337-38).

Petitioner seeks to develop a theory of motivation for the claimed conspiracy derived from alleged resentment in the industry regarding the supposed innovative method of doing business. However, the record below was entirely devoid of proof that Clark-Schwebel was party to such resentment. On the contrary, the record showed that Clark-Schwebel encouraged Textura's efforts to sell directly to building contractors, by issuing credits (DX AA, DX AB) to help finance the publication of one of Textura's selling tools, a book called "The Engineers' Guide" (PX 1; see also App. A 3337-38); by writing laudatory letters to such contractors (DX AC), and by helping to arrange for cash contributions for promotional purposes from P.P.G. Industries, Inc., a manufacturer of fiber glass yarn (Tr. 1539-40). Moreover, despite petitioner's italicized assertion to the contrary (Pet. p. 11),* there was absolutely no evidence be-

* The record references in supposed support of this assertion all relate to supposed complaints to Burlington; the contention that these complaints provided motivation for Burlington to drive Textura out of business was brought to the attention of the Court of Appeals and fully considered by that Court (App. A 3358-59).

low of complaints by Textura's competitors to Clark-Schwebel about Textura's method of doing business. Petitioner's theory of why Clark-Schwebel would want to drive a customer out of business is thus totally without evidentiary support. The reason for Textura's demise lies elsewhere.

Throughout its existence, Textura by Powrie's own admission was a "financially thin" company (Tr. 645). It chronically was in a deficit working capital position (DX BG; Tr. 2045-46, 2062),* having made a profit greater than $8,000 in only three of the twelve years of its existence. It had an overall loss for the period 1954 through 1965 of nearly $60,000 and a loss of $125,000 for the years 1964 and 1965 alone (DX B). The history of the dealings of each defendant with Textura evidences a long-period of forbearance and of each attempting to work with Textura in its own way in the hope that Textura would eventually become successful.

One of the ways each of the defendants worked with Textura was not to insist upon the terms of sales contracts regarding shipment of goods woven specially for Textura on the scheduled delivery date. Powrie "appreciated" these favorable terms (Tr. 645) and Textura took advantage of the situation by failing to request shipment of goods for long periods of time, despite repeated requests to do so (DX T, AD, and AE). Another way in which Textura took advantage was by failing to pay its invoices when due. The Court of Appeals referred to the repeated efforts by Clark-Schwebel to speed up payment, originally made with humor

* Textura's audited figures for year end 1964 show a negative working capital of $98,650 (PX 20) and a negative figure of $50,900 for the year end 1965 (PX 36).

and eventually with stronger measures, such as commencing, near the end of 1965, to charge interest on invoices more than 30 days old (App. A 3340).

Throughout the entire period of its dealing with defendants, Textura made numerous complaints regarding the quality of goods shipped by all its suppliers and sought to obtain allowances for the alleged quality defects (Tr. 979, 1488). While Textura was always satisfied with the adjustments given to it by Burlington and Stevens, it was not satisfied with Clark-Schwebel's handling of its claims (Tr. 653).

The pivotal event in Textura's relationship with Clark-Schwebel was Powrie's unilateral assertion by letter dated February 24, 1966, of the right to a $30,000 credit against its accounts payable to Clark-Schwebel because of alleged quality defects (DX AJ). Clark-Schwebel reacted quickly to this arbitrary action by the one customer for which it had always "bent over backwards" (Tr. 1528) and billed Textura on March 1 for all goods woven and ordered but not yet called out (approximately $90,000). Clark-Schwebel also put Textura on a cash basis for all future purchases, pending resolution of the dispute.

The first information received by Burlington regarding the controversy between Clark-Schwebel and Textura was on June 8, 1966 (PX 131), when Clark-Schwebel and Textura were each about to invoke the arbitration clause of their contracts to resolve the dispute. Burlington (and Stevens) evidenced a natural and justified concern for the viability of "financially thin" Textura, should it lose the arbitration and have to pay Clark-Schwebel $90,000. Textura was, however, at a meeting on July 29, able to reach a settlement of its dispute with Clark-Schwebel (PX 166), and acknowledged in the written settlement agreement a debt of some $70,000 to Clark-Schwebel (DX G). However, Textura never paid more than $5,000 called for by that agreement (Tr. 572). It continued to purchase goods from Clark-Schwebel in 1966 only on a cash basis (DX CK). In contrast, both Burlington and Stevens continued to extend not less than 60 days credit to Textura throughout 1966 (Tr. 652, 743, 2155).

As the Court of Appeals detailed at length, while Textura made only minimal purchases from Clark-Schwebel after March 1, Burlington's shipments to Textura increased substantially in the first seven months in 1966 over the comparable 1965 period (App. A 3346-48). Moreover, after Clark-Schwebel had refused to weave new contracts for Textura in early March pending resolution of their dispute, Burlington wove for Textura, among other fabrics, 25,000 yards of a fabric formerly obtained exclusively from Clark-Schwebel (App. A 3351).

In July, 1966, Textura's factor, Dommerich, had determined for reasons of its own to terminate its factoring arrangement with Textura and, as protection for sums advanced, built up and retained a large cash reserve in Textura's account in July and August, 1966. Powrie testified that Dommerich's building up of its reserves had a devastating effect on his "financially thin" operation in that "we didn't have cash to operate with" (Tr. 461-62). Dommerich's termination of its factoring agreement with Textura and Textura's inability to find a substitute factor, led to Textura's going out of business in December, 1966.

Twice at the end of plaintiffs' case the District Court ruled that there was no evidence that Dommerich had participated in a conspiracy with defendants (Tr. 1744-45, 1808-09).

Proceedings Below

At trial, the District Court reserved decision on defendants' motion for a directed verdict at the conclusion of plaintiffs' case. The case was submitted to the jury which, after four and one-half days of deliberation, returned a verdict against the respondents. Subsequently, respondents filed extensive motions for a directed verdict, for judgment *n.o.v.*, and for a new trial, which were denied in a memorandum opinion which spent only two paragraphs (App. B 2) dealing with the question of the sufficiency of the evidence.

In their briefs to the Court of Appeals, respondents raised numerous issues in addition to the question of the sufficiency of the proof of conspiracy. In light of its disposition of that issue, the Court of Appeals did not find it necessary to consider defendants' additional contentions that:

(1) there was insufficient evidence from which the jury could find that defendants' actions caused Textura to go out of business;

(2) the award of damages to Textura was based on pure speculation;

(3) fundamental errors in the charge required reversal;

(4) other errors in the conduct of the trial, relating to the receipt of prejudicial evidence and the absence of the trial judge during the concluding phase of the trial, required reversal.

Of course, if *certiorari* were to be granted, defendants would raise all these points in support of the judgment of the Court of Appeals. *Langnes* v. *Green*, 282 U.S. 531, 535-39 (1931); *Walling* v. *General Industries Co.*, 330 U.S. 545, 547 (1947).

ARGUMENT

Petitioner does not contend that any substantive principles of antitrust law were incorrectly understood or wrongly applied by the Court below. Moreover, petitioner concedes that a claim of misconstruction of the evidence by the Court of Appeals would not warrant this Court's review (Pet. p. 24). Petitioner instead raises a procedural argument: that this Court should declare a new rule of appellate review that whenever a trial judge declines to grant judgment *n.o.v.*, the Court of Appeals should not be permitted to exercise its normal supervisory function. We discuss this contention in Point I below.

Secondly, petitioner claims that the Court of Appeals ignored Textura's theory of the case. We demonstrate in Point II that this is in fact not correct. Indeed, petitioner's argument on this point is simply an attempt to recast the arguments presented to the Court of Appeals and rejected by that Court.

I

The Court of Appeals acted in accord with appropriate standards of appellate review.

Petitioner's first five Questions Presented (Br. pp. 2-3) are in fact a multiple repetition of one question: whether the Court of Appeals ignored established principles of appellate review—variously phrased in terms of Due Process (Question 1), the Seventh Amendment (Question 2), the Federal Rules of Civil Procedure (Question 3), general principles of appellate review (Question 4) and judicial administration (Question 5)—in holding that defendants' motions for a directed verdict and judgment *n.o.v.* should have been granted.

The Court of Appeals in fact spent several pages of its opinion discussing the proper standards of appellate review, and indeed cited the very cases which petitioner here emphasizes (App. A 3344-46, 3358-60). Thus, the Court of Appeals quoted from *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962) to the effect that it was "bound to view the evidence in the light most favorable to [the plaintiff] and to give [him] the benefit of all inferences which the evidence fairly supports, even if contrary inferences might reasonably be drawn." (App. A 3344).* The Court of Appeals further cited (App. A 3345) the cases of *Klor's, Inc.* v. *Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959) and *Fashion Originators' Guild of America* v. *F.T.C.*, 312 U.S. 457 (1941) relied on and cited by petitioner. Even more specifically, the Court of Appeals, after reviewing plaintiffs' principal contentions, went on to a discussion of "the other evidence" (App. A 3358-60). In such discussion, it specifically endorsed the point

* For specific examples of the Court's application of this principle, see App. A 3354, n. 12 and 3351-52.

urged by petitioner (Pet. p. 24) that a reviewing court should not limit itself to "pieces of the mosaic without viewing the evidentiary picture as a whole." (App. A 3359). In its discussion of the evidence as a whole, the Court again referred to petitioner's principal authority, *Continental Ore* v. *Union Carbide & Carbon Corp.* (App. A 3359).

Moreover, as to petitioner's claims that the issue of motive somehow requires special attention, the Court of Appeals after reciting the evidence on the subject (App. A 3358-59), concluded that "the evidence does not reasonably support a finding of any motivation on Burlington's part to enter a conspiracy against Textura" (App. A 3359). In so concluding, the Court of Appeals referred specifically to *First Nat. Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), in which this Court upheld a grant of summary judgment against plaintiff. There, plaintiff's theory of defendant's motivation to enter into an illegal conspiracy had similarly been rejected as a matter of law by the lower courts. Thus, there can be no contention that the Court of Appeals was somehow unaware of this Court's enunciated standards of appellate review.

Petitioner, however, would have a Court of Appeals confronted with a jury verdict and denial of judgment *n.o.v.* abdicate its function entirely and adopt "a rule that when a jury verdict is explicitly concurred in and approved by the trial judge, it will not be reversed on appeal on the sole ground that the facts do not sustain the verdict." (Pet. p. 26). The Court of Appeals itself provided a response to this contention.

> "If, however, after viewing all the evidence most favorably to plaintiff we cannot say the jury could reasonably have returned the verdict in his favor, our

duty is to reverse the judgment below. The jury's role as a finder of fact does not entitle it to return a verdict based only on confusion, speculation or prejudice; its verdict must be reasonably based on evidence presented at trial." (App. A 3344)

The restriction on the Court of Appeals' jurisdiction which petitioner here urges is contrary both to statutory authority and a long line of decisions of this Court. In *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967), this Court specifically approved the Court of Appeals' reversal of a denial of a motion for judgment *n.o.v.*, and its direction of entry of judgment for the losing party below. Interpreting 28 U.S.C. §2106, this Court wrote:

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v.* See *Baltimore & Carolina Line, Inc.* v. *Redman, supra.* Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n.o.v.* on appeal. . . ." 386 U.S. at 322.

See also *United States* v. *Generes*, 405 U.S. 93 (1972), where this Court itself directed the entry of judgment *n.o.v.*, reversing a decision of the Court of Appeals, and similarly *New York, N.H. & H. R.R. Co.* v. *Henagan*, 364 U.S. 441 (1960).*

* Petitioner suggests that "findings" of the trial court in its memorandum (App. B) denying judgment *n.o.v.* in effect constitute findings of fact under Fed. R. Civ. P. Rule 52(a), which could not be overturned unless clearly erroneous (Pet. p. 2). The decisions of this Court provide that even trial court findings pursuant to Rule 52(a)

(footnote continued on next page)

It is respectfully submitted that there can be no quarrel with the standards of appellate review applied by the Court of Appeals.

II

The Court of Appeals fully considered and correctly rejected all of petitioner's factual contentions.

Since there is no claim raised that the Court of Appeals erred as to the applicable substantive principles of antitrust law and, as demonstrated above, there can be no question that the Court of Appeals did not act with full cognizance of the applicable standards of appellate review, petitioner's only possible claim is that somehow those principles were wrongly applied to the facts of this case. Whether or not such a claim in the abstract would merit the attention of this Court, a reading of the thorough and searching 27-page opinion of the Court of Appeals reveals that there is utterly no merit to petitioner's contention that the Court reached its decision "without taking into account either the verdict-winner's theory of his case, or the evidence which the jury, and the trial judge, regarded as controlling." (Pet. p. 2).

There would seem to be no better place to determine "the verdict-winner's theory of his case" than to consult its brief in the Court of Appeals. Petitioner was in fact granted permission by the Second Circuit to file a 137-page

must be overturned when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (*United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)), a standard similar to that applied by the Court of Appeals below. Moreover, the statements directed to the merits in the two-paragraph discussion by the trial judge in his opinion (App. B 2) are in such generalized, conclusory form that they could not qualify as the "special" findings of fact required under Rule 52(a).

brief to set forth that theory, which is summarized in the argument heading for Point I:

> "The evidence of defendants' motives, their opportunities to conspire, their frequent contacts and communications, their harmful actions against Textura, including restrictions on credit and refusals to accept or process orders, is sufficient to support the jury's determination that defendants conspired."

There can be no doubt in studying the careful opinion of the Court of Appeals, that each of the points emphasized by plaintiff below was considered at length by the Court of Appeals and plaintiff's arguments as to each item given their full weight.

A. The Alleged Refusal to Accept or Process Orders

The Court set forth in detail the facts with respect to the shipment of goods by Clark-Schwebel to Textura in 1966, and the contrasting record of the shipment of goods from Burlington to Textura, during the same period (App. A 3341-42, 3346-52). The Court noted the drastic reduction in the shipments by Clark-Schwebel after March 1, 1966, when Textura and Clark-Schwebel became engaged in the dispute which ultimately led to the filing of an arbitration demand (App. A 3347). Clark-Schwebel's shipments after March 1 never regained substantial volume primarily because Clark-Schwebel was demanding payment of its overdue bills (and thereafter payment under the settlement agreement) prior to shipping additional goods, and such payments were not forthcoming (App. A 3341).

On the contrary, Burlington's shipments in the early months of 1966 (when Clark-Schwebel and Textura were

engaged in the dispute), were higher than Burlington's 1965 average monthly shipments to Textura. As the Court pointed out:

> "Had Burlington and Clark-Schwebel been conspiring to coerce Textura into accepting Clark-Schwebel's demands, one would expect Burlington's shipments to be reduced similarly, thereby increasing the pressure on Textura to settle its dispute with Clark-Schwebel on terms unfavorable to Textura." (App. A 3347-48)

The Court then turned its attention to Textura's contention that after Textura had entered into the settlement agreement with Clark-Schwebel on July 29, the downward turn in Burlington's shipments to Textura (in August and September particularly) somehow could be considered conspiratorial. The Court, after reviewing the evidence (App. A 3349-50), concluded there was no evidence of collaboration on the part of Burlington and Clark-Schwebel relating to this trend and "[t]he record, furthermore, is clear that Burlington alone made the decision to hold up approval of the new orders, and for its own independent reasons. . . ." (App. A 3350). Burlington's decision which resulted in the temporary reduction of its sales to Textura had been made in March and April, long prior to June 8, when the information regarding Clark-Schwebel's dispute with Textura was first communicated to Burlington (App. A 3350). The reason for Burlington's decision was Powrie's refusal to renew his personal guarantee despite what Burlington had construed as a promise on his part to renew. The Court concluded:

> "The two companies followed wholly different policies in their sales of fabrics to Textura. Burlington had developed its policy long prior to the period of the

alleged conspiracy and did nothing to change it in response to Clark-Schwebel's switch to a harder line. Indeed Burlington's large shipments in the spring and summer would tend to undercut Clark-Schwebel's position." (App. A 3351)

In holding that Burlington's alleged refusal to accept or process orders did not provide a basis for concluding that a conspiracy existed, the Court also fully considered subsidiary contentions of petitioner with respect to Clark-Schwebel fabrics ("Homespun" and "Morro") which Burlington sought to weave (App. A 3351-52).

B. The Alleged Credit Restrictions

Similarly, the Court of Appeals considered at length petitioner's contentions regarding credit policies towards Textura and explicitly dealt with them in an orderly way. This is to be contrasted with the manner in which the argument is advanced in the petition: that is, setting forth isolated items from the record without placing them in chronological or other logical order.* The Court, after detailed discussion of the credit situation (App. A 3353-55), concluded:

"Far from indicating any conspiracy to pursue common credit policies designed to drive Textura out of

* For example, it is stated that Clark-Schwebel "initiated an interest charge on Textura's account for the first time" (Pet. p. 16). This statement is placed in a context that would indicate that this event occurred near the end of Textura's business life in 1966. In fact, Clark-Schwebel's initiation of interest charges, as the Court of Appeals noted, took place in December, 1965, four months before the alleged conspiracy is said to have begun (App. A 3340), and was done at a time when Textura's accounts payable had doubled from the previous year (DX BW), and when Textura had failed to call out goods which Clark-Schwebel had, six months before, requested be called out before December 31 (Tr. 781-82). In fact, the interest charges were never paid (see DX G).

business, the picture is just the opposite, with one creditor (Clark-Schwebel) adopting a procrustean policy while the other (Burlington) sought through leniency to capture some of the business being given up by the first." (App. A 3355)

C. Communications Between Defendants

The Court next considered the communications between Burlington and Clark-Schwebel, setting forth the substance of the discussions in detail in the margin of its opinion (App. A 3356, n. 16). The Court placed this evidence in context by referring to the opinions of this Court holding that "the exchange of information between business firms concerning the creditworthiness of customers has long been held not to violate the Sherman Act." *See, e.g., Cement Manufacturers Protective Association* v. *United States,* 268 U.S. 588 (1925). These authorities are not questioned by petitioner; rather, they are totally ignored.

After detailing the specific statements in each of the credit communications, the Court concluded that "the conversations concerning Textura do not support any inference that Clark-Schwebel and Burlington stepped beyond these permissible boundaries." (App. A 3357). The Court further said that these conversations "viewed with or without the balance of the evidence" were insufficient to support the verdict (App. A 3358).*

* Petitioner suggests that these credit exchanges were not carried out by "regular" credit men (Pet. pp. 12-13). However, petitioner's listing of the *dramatis personae* is totally inaccurate: Mr. Wilson was an officer of Stevens, never of Burlington (Tr. 1631); Mr. Clark died two years before the alleged conspiracy commenced (Tr. 235), and there was no claim or evidence that Messrs. Colton or Vollers ever participated in any conversation with anyone at Clark-Schwebel. Mr. Kelly, who was "a credit man all my life" (Tr. 1839) did have conversations with Messrs. Schwebel and Nordheim who acted as a *de facto* credit department because Clark-Schwebel had no credit men as such (Tr. 1137). The Court of Appeals took full cognizance of these conversations (App. A 3356, n. 16).

D. Plaintiffs' Other Claims, Including Motive

Finally, the Court turned to the supposed "other evidence." Unlike petitioner, however, the Court again placed the various statements gleaned from the 2500-page record,* and relied upon by petitioner here, in proper context. Thus, "the isolated statement of a Burlington official in 1964, two years before the alleged conspiracy, that he would be happy if Burlington did not deal with Textura, cannot be construed as an admission of participation in a conspiracy not planned or begun until years later, particularly in view of the fact that Burlington continued to do business with Textura up until the time of the latter's bankruptcy." (App. A 3358). The statement of the Burlington official is again featured in the petition (Pet. p. 11), but without reference to when it was uttered.

After examining petitioner's alleged proof of motivation, the Court concluded that the evidence, in sum, "does not reasonably support a finding of any motivation on Burlington's part to enter a conspiracy." (App. A 3359). As discussed above (pp. 4-5), petitioner's theory that Clark-Schwebel was motivated to drive Textura out of business because of antagonism to its method of selling direct is totally contradicted by the record. Petitioner's present

* On pages 13 to 16 of his petition, petitioner sets forth certain isolated quotations from the record, without indication when the events referred to occurred, or their context. It would take a brief three times this size to put each of those quotations in context but certainly the great majority of them—and certainly the items emphasized by petitioner's previous counsel—were specifically discussed by the Court of Appeals. *See, e.g.,* discussion of Item 1 at App. A 3340-41; Item 9 at App. A 3351, n. 11; and Item 17 at App. A 3340. Suffice it to say that a Court of Appeals, in order properly to fulfill its function, is not required to deal with every individual statement in a 2500-page record.

theory of Clark-Schwebel's motivation is something new, not argued to the Court of Appeals and totally without evidentiary support.

E. Petitioner's Additional Contentions

Petitioner further suggests that the Court of Appeals failed "to come to grips with the essential facts of the case." (Pet. p. 19). In fact, however, petitioner's references in support of this conclusion are not to "the essential facts" of the case, but to various statements by the Court with which petitioner takes issue. Petitioner's cavils, even if correct, would not justify the granting of certiorari; in fact, however, they are not correct.

First, petitioner refers to what he considers the Court of Appeals' negative view "of Textura as 'slow pay'." (Pet. p. 19). However, the sentence quoted from the Court of Appeals' opinion* accurately stated the facts. Petitioner would simply have the Court of Appeals ignore the further undisputed fact that "[o]ver the years each supplier periodically would press Textura to 'call out' fabrics sooner, and to speed up its payments for fabrics already delivered." (App. A 3338-39).

Second, petitioner raises an issue regarding Textura's financial position and its alleged sales and profits in 1966 (Pet. pp. 20-21). The Court of Appeals more than bent over backwards to accept Textura's factual position regarding

* "Furthermore, while the terms of the supplier's invoice required payment within 30 to 60 days, Textura rarely, if ever, met these terms; often it did not pay until 90 days or more after the invoice date, and on one occasion 140 days later." (App. A 3338).

the amount of its 1966 sales, rejecting Textura's bookkeeper's sworn admission that sales were increased by virtue of including in one month's figures the sales recorded in the next succeeding month until a total of $150,000 was reached for the first month (App. A 3354, n. 12). (Indeed this policy of distorting 1966 sales had been confirmed by Textura's principal, Powrie, on the witness stand (Tr. 804).) The Court of Appeals nevertheless accepted the sales and profits figures at face value, but pointed to what has never been disputed—that Textura's net asset position was so low that an unfavorable determination in the arbitration proceeding with Clark-Schwebel would have led to Textura's ruin (App. A 3353-54).

Third, petitioner suggests that an internal memo dated January 13, 1966, reporting a conversation between Kelly of Burlington and Nordheim of Clark-Schwebel on that date casts doubt on the conclusion that Burlington did not learn of Clark-Schwebel's termination of Textura's credit until June 8, 1966. However, what petitioner ignores is that the termination of credit did not occur until March 1, 1966, almost two months after the January 13, 1966 discussion, and could not have been a subject of that conversation.

Fourth, petitioner seeks to reargue the details of Burlington shipments to Textura which were discussed in great detail by the Court of Appeals (App. A 3346-52) and summarized above. (See pp. 14-16, *supra*.) To repeat, Burlington shipped large quantities of fabric to Textura at the time when the dispute between Textura and Clark-Schwebel was at its most critical point; and the later decline in shipments cannot be connected in any way with communication with

Clark-Schwebel. Moreover, petitioner is simply in error when he asserts that Burlington did not weave new orders for Textura after March 1, 1966 (Pet. p. 22); by August 25, 1966, Burlington's sales department had agreed to accept and weave all of the new orders which had been submitted by Textura (PX 548).

These specific items raised by petitioner are simply an attempt to reargue the facts. In fact, the Court of Appeals thoroughly considered all of petitioner's contentions below and, applying the appropriate standards of appellate review, rejected them.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

September 10, 1976

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-132

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS, *Petitioner*

v.

CLARK-SCHWEBEL FIBERGLASS CORPORATION and BURLINGTON INDUSTRIES, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT BURLINGTON INDUSTRIES, INC. IN OPPOSITION

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OPINIONS BELOW

The unanimous opinion of the Court of Appeals for the Second Circuit (Appendix A to the Petition) is reported at 504 F.2d 1036 (2d Cir. 1976). The "Memorandum Order" of the District Court denying post-trial motions for a directed verdict, judgment n.o.v. or in the alternative a new trial (Appendix B to the Petition) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1976. A petition for rehearing was denied by the Court of Appeals on May 12, 1976 (Pet. App. A[1]). The petition for a writ of certiorari was filed on July 29, 1976. On August 16, 1976, respondent Burlington Industries, Inc., was granted an extension of time to and including September 10, 1976, within which to file its brief in opposition to the petition. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly concluded that in this antitrust conspiracy case the circumstantial evidence relied upon by petitioner was insufficient to support the verdict and that the undisputed facts were antithetical to the existence of a conspiracy.

2. Whether this Court should adopt a rule in this case that whenever a jury verdict is concurred in by the trial judge on post-trial motions a reviewing court may not set aside the verdict as being unsupported by the evidence.

STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. 1) and Section 4 of the Clayton Act (15 U.S.C. 15), as well as Constitutional provisions and rules relied upon by petitioner, are set out in the petition at pp. 3-4.

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[1] "Pet. App." as used herein refers to the appendices to the petition. The transcript of testimony and other trial proceedings is cited as "Tr." and plaintiff's and defendants' trial exhibits are cited, respectively, as "PX" and "DX."

STATEMENT OF THE CASE

This is a private treble damage antitrust action under § 4 of the Clayton Act (15 U.S.C. § 15) alleging that defendants Clark-Schwebel Fiberglass Corporation (Clark-Schwebel), J. P. Stevens and Co., Inc. (Stevens) and Burlington Industries, Inc. (Burlington)—manufacturers of fiberglass decorative fabrics—violated Section 1 of the Sherman Act (15 U.S.C. § 1) by conspiring to drive a former customer, Textura Ltd., out of the business of converting fiberglass fabrics into curtains and draperies for installation in office and apartment buildings.[2]

It was alleged that this conspiracy was effectuated and evidenced by consciously parallel restrictions of Textura's credit by respondents, withholding or delaying deliveries of needed fabrics, deliberate shipment of inferior merchandise, coercion of Textura to settle an arbitration proceeding between it and Clark-Schwebel arising from petitioner's unilateral deduction of $30,000 as a credit against accounts it owed to Clark-Schwebel, and inducement of Textura's factoring firm to terminate an agreement pursuant to which Textura sold certain of its accounts receivable and without which Textura could not operate (Pet. 17).

Petitioner also claimed that defendants had a motive to drive Textura out of business. It was contended that Burlington (and Stevens) had received complaints over a long period from Textura's "competi-

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[2] Textura, successor to a company known as "Glass Fabrics, Inc.," appears here, as it did below, through its trustee in bankruptcy. For convenience, these parties are referred to herein as "Textura" or "petitioner."

tors" about Textura's selling methods,[3] that Clark-Schwebel was concerned about Powrie's complaints over fabric quality and his general "querulousness," and that as a result of these matters respondents conspired to drive Textura out of business.[4]

Defendants denied all of these allegations, asserting that the business transactions relied upon as circumstantial evidence of conspiracy were neither similar nor parallel but were reasonable actions consistent with the independent business self-interest of suppliers trying to get paid for merchandise sold to a cash-poor customer.[5]

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[3] Much of the present petition is devoted to a recitation of the development by Textura's principal, Malcolm G. Powrie, of the new market for fiberglass drapes represented by large apartment and office buildings which, before the advent of Textura, had used venetian blinds. This led the Court of Appeals to question "how significant the competition between these [complaining] firms and Textura was" (Pet. App. A, 3358-3359, n.17).

[4] The petition incorrectly states that Textura's competitors complained "*to all three defendants* about Powrie's 'direct selling'" (Pet. 11; emphasis by petitioner). There was absolutely no evidence that Clark-Schwebel ever received any such complaints and, as noted, petitioner relied on a theory of personal animosity as supplying Clark-Schwebel's "motivation" to destroy Textura. The petition is replete with other misstatements and distortions of the record (some of which are discussed in the Argument below). We note at this point that Mr. John Wilson is said to be a principal "conspiring actor" as Vice President of Burlington (Pet. 12). In fact, Mr. Wilson was employed by J. P. Stevens which was exonerated by the jury. Similarly, Mr. Ray Clark is said to be another principal "conspiring actor;" yet Mr. Clark died two years before the conspiracy allegedly began. Tr. 235.

[5] Undisputed facts established that throughout Textura's 12-year history it was a "financially thin" company and never had sufficient cash with which to operate. For example, Textura's working capital was chronically negative (minus $98,650 in 1964 and minus $50,000 in 1965). *See* PX 20, PX 36. Textura suffered combined losses of about $125,000 in the years 1964 and 1965 alone (DX B). Its gross sales never exceeded $1.5 million annually (*id.*). One can scarcely credit petitioner's present assertion that Textura in 1966 was "robust," "burgeoning," and faced "rosy financial prospects" (Pet. 10).

The case proceeded to trial before Judge Tenney and a jury on October 15, 1974. Upon conclusion of plaintiff's case in chief, defendants jointly moved for a directed verdict on the ground that plaintiff's circumstantial evidence gave rise to no inference of conspiracy. Decision was reserved on this motion.

On November 18, 1974, the jury returned a verdict against Burlington and Clark-Schwebel finding a conspiracy to drive Textura out of business (Tr. 2447-48). Defendant Stevens was exonerated. Single damages were assessed in the amount of $531,617.00, which were trebled by judgment entered on November 22, 1974.

In a "Memorandum Order" dated May 2, 1975, the District Court, without citation to a single case, denied defendants' renewed motions for a directed verdict and for judgment notwithstanding the verdict or in the alternative for a new trial.[6]

On April 21, 1976, the Court of Apeals for the Second Circuit in a 27-page opinion unanimously reversed

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[6] At page 19 of the petition, Textura implies by its citation to the "Memorandum Order" (*e.g.*, "App. B, pp. 2ff") that the trial court discussed the evidence allegedly supporting the verdict in detail. In fact, only two paragraphs of the "Memorandum Order" referred to the evidence and this reference was in the most conclusory, unanalytical terms (*see* Pet. App. B, p. 2). Moreover, the district court erroneously concluded that efforts by Burlington to assure payment by Textura of its outstanding indebtedness, including a request that the accounts be personally guaranteed by Mr. Powrie, were contrary to Burlington's self-interest and thus constituted circumstantial evidence of conspiracy (*id.* at p. 2).

the judgment of the district court on the ground that the evidence—viewed in the light most favorable to Textura and affording the prevailing party all reasonable inferences—was insufficient to support the verdict, and indeed, that the verdict was totally contradicted by undisputed facts. Fully and carefully considering all the facts advanced by petitioner in support of the verdict, including those set out in the present petition, the Court of Appeals concluded that each respondent had acted independently and consistently with its own business interest in its dealings with Textura.

As detailed by the Court of Appeals and set out more fully in the Argument below, the facts showed, among other things, that during the very heart of the alleged conspiracy (March 1, 1966 until December, 1966): 1) Burlington continued to extend credit to petitioner and to ship fabrics in record amounts while Clark-Schwebel terminated credit and refused to ship fabrics except for cash; 2) Burlington accepted new styles for weaving for Textura, including at least one fabric formerly woven by Clark-Schwebel but which the latter refused to weave pending resolution of its arbitration dispute with Textura; 3) Burlington always made satisfactory adjustments on Textura's quality claims, while Clark-Schwebel never did; 4) Burlington extended credit to Textura running into 1967 and accepted new contracts for that year notwithstanding Mr. Powrie's failure in 1966 to renew a personal guarantee he had given to Burlington in 1965; and 5) Burlington, unlike Clark-Schwebel, never withdrew Textura's warehousing privileges but continued to weave and store fabrics for Textura at Burlington's own expense until called out by petitioner.

The Court of Appeals held that respondents' sales and credit actions were thus not similar or parallel in substance or timing and, even if this fact were otherwise, no inference of conspiracy would be permissible since the actions at issue were consistent with individual business self-interest and reasonably could have been expected in the absence of any conspiracy. With specific reference to Burlington, the Court held that the record showed beyond question that this defendant "sought through leniency to capture some of the business being given up by [Clark-Schwebel]" (Pet. App. A, p. 3355).

Noting that the evidence provided no basis for a finding of conspiracy, the Court of Appeals concluded (Pet. App. A, pp. 3345-3346):

> . . . The record, on the contrary, reveals at most independent efforts by each of the three suppliers lawfully to continue doing business with a customer which was in a financially precarious condition on terms that would protect the supplier from ending up unable to obtain payment for goods supplied. Each pursued a substantially dissimilar and divergent course from the others in its efforts to achieve this objective; each was, however, ultimately unsuccessful in obtaining payment of all of Textura's indebtedness to it.[7]

Textura's petition for rehearing, based on factual arguments similar to those advanced in the present petition, was denied on May 12, 1976.

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[7] At the time of its assignment for the benefit of creditors in December of 1966, Textura owed Burlington approximately $20,000 (PX 806).

ARGUMENT

Introduction and Summary

The Court of Appeals, after a thorough and fair review of the facts relied upon by petitioner in support of its theory of conspiracy, held that the verdict was not only unsupported by the evidence but was contrary to the undisputed facts. In concluding that the "evidentiary picture is not even dimly one of conspiracy" (Pet. App. A, p. 3345), the Court of Appeals applied the settled principle, often affirmed by this Court, that lower courts not only have the power but the duty to set aside a verdict that is not sustained by the evidence.

While devoting no fewer than 18 of the 28 pages of the petition to a discussion of the facts allegedly misperceived by the court below, petitioner concedes, contradictorily (but correctly), that "mere misconstruction of the evidence would not justify certiorari" (Pet. at 24). Yet plaintiff does not contend that the court below improperly interpreted or applied substantive antitrust law or that it committed any error other than in its conclusion that the verdict was totally lacking in evidentiary support and therefore should be set aside.

Petitioner suggests that this Court, in the exercise of its supervisory responsibility, should withdraw the power and duty of reviewing courts to set aside unsupported verdicts in cases where the trial judge, in denying post-trial motions, "agrees" with the verdict. Premised on the notion that two wrongs make a right, the proposed rule would forbid reviewing courts from upsetting palpably wrong verdicts so long as the trial judge concurred in the error. Lacking merit on its face, this proposal to abrogate appellate review in large numbers of cases is nothing more than an effort to screen the inescapable fact that this case raises routine factual questions of interest only to the immediate parties involved, and which were in any event correctly decided by the Court of Appeals. No question of law, procedure or policy warranting plenary consideration by this Court is presented and the petition should be denied.

I.

THE COURT OF APPEALS FULLY CONFRONTED PETITIONER'S THEORY AND EVIDENCE AND CORRECTLY CONCLUDED THAT THE VERDICT WAS TOTALLY WITHOUT SUPPORT

Petitioner contends that the Court of Appeals failed to "confront" Textura's theory of conspiracy and failed to consider the evidence supporting that theory. Neither contention has merit.

The Court of Appeals specifically noted (Pet. App. A, pp. 3335, 3345, 3353) that petitioner's theory of conspiracy was to the effect that respondents Burlington and Clark-Schwebel (along with Stevens) pursued parallel courses of action in (1) restricting credit, (2) delivering defective fabrics, (3) withholding deliveries of fabrics, (4) refusing to weave fabrics, and (5) forcing Textura to settle its dispute with Clark-Schwebel on unfavorable terms, all of which actions were alleged to have been contrary to the independent self-interests of respondents. In addition, as noted by the Court of Appeals (Pet. App. A, 3355-3359), Textura alleged that a motive existed for respondents to act as they did, as reflected in certain purported "admissions" made by Burlington personnel, and that the conspiracy

was effectuated by means of a series of telephone calls between credit men at Burlington, Clark-Schwebel, and Stevens in which the status of Textura's credit, including its dispute with Clark-Schwebel, was discussed.[8] The Court's understanding of petitioner's theory thus comports precisely with Textura's own statement of its contentions in the present petition (*e.g.*, Pet., p. 17).

The Court of Appeals specifically reviewed all of Textura's contentions and the evidence offered in their support, mindful of its duty to view the evidence in the light most favorable to plaintiff and to give plaintiff the benefit of all inferences fairly supported by the evidence. Nonetheless, as noted by the Court (Pet. App. A, p. 3344):

> If, however, after viewing all the evidence most favorably to plaintiff, we cannot say that the jury could reasonably have returned the verdict in

[8] The Court reviewed these credit communications in detail (Pet. App. A, pp. 3355-58). Only members of Burlington's Credit Department were involved in these credit exchanges and there was no evidence that personnel of Burlington's sales department ever communicated with any other defendant about Textura. The Court of Appeals correctly held that the exchange of credit information, unlike the exchange of pricing data, raises no question under the antitrust laws "provided that any action taken in reliance upon [such credit information] is the result of each firm's independent judgment, and not of agreement" (*id.*, p. 3357). The Court held that the undisputed facts concerning the content of the communications in the present case, and the actions of the parties, "do not support any inference that Clark-Schwebel and Burlington stepped beyond these permissible boundaries" (*id.*). As we show below, Burlington's credit and sales actions, as the Court found, were the result of independent business judgment and were formulated *before* the first of these allegedly conspiratorial communications occurred. *See* pp. 11-16, *infra*.

> [plaintiff's] favor, our duty is to reverse the judgment below. The jury's role as the finder of fact does not entitle it to return a verdict based only on confusion, speculation or prejudice; its verdict must be reasonably based on evidence presented at trial.

Citing *Continental Oil Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962)—the case primarily relied upon by petitioner here—the Court of Appeals also recognized its duty to view the alleged evidence of conspiracy as a whole, rather than dismembering it and considering its parts in isolation (Pet. App. A, p. 3344). Reviewing the evidence in accordance with this principle, the Court concluded: "But even when the evidence is viewed as a whole, the picture is not even dimly one of conspiracy" (App. A, p. 3359).[9] This conclusion was plainly correct and it presents no issue meriting review by this Court.

A. The Alleged Restrictions of Textura's Credit

The Court of Appeals held that the credit policies of Burlington and Clark-Schwebel toward Textura, the principal basis of Textura's complaint, could not support an inference of conspiracy (Pet. App. A, p. 3353). As the Court found (*id.*), "[n]ot only did the credit policies of each supplier differ substantially but there is no evidence indicating that they were mutually for-

[9] Based on this conclusion, the Court found it unnecessary to rule upon respondents' additional contentions that neither the fact nor amount of damages had been proven by reliable evidence and that numerous procedural errors in the conduct of the trial (including a portion of the charge admitted by the trial judge to be wrong (Tr. 2382-83)) required a new trial. *See* Pet. App. A, pp. 3359-60.

mulated or invoked."[10] With specific reference to Burlington's credit actions in 1966—relied upon heavily by Textura as proof of this respondent's participation in a conspiracy—the Court concluded that "the evidence shows that these actions were the result of Burlington's independent judgment and not the product of any conspiracy with Clark-Schwebel" (*id.*).

The record permits no other conclusion. The evidence clearly demonstrated that Burlington independently formulated its credit policy toward Textura long before the alleged commencement of the conspiracy (March, 1966). Thus, as the Court noted (Pet. App. A, pp. 3339-40), on April 2, 1965, a year before the conspiracy began, Burlington decided to require Powrie's personal guarantee for 1965 because of the "staggering" losses incurred by Textura in 1964. *See* DX BB. Similarly, as the Court also pointed out (Pet. App. A, pp. 3341-42), Burlington on the same date decided to require payment from Textura within 90 days from the date of invoice and obtained Textura's promise to work toward eventual prompt payment (*i.e.*, 60 days). *See* DX BB. On December 30, 1965, Burlington decided to hold up shipments if Tex-

[10] It cannot be disputed that the acts and practices of Burlington and Clark-Schwebel were substantially dissimilar, with Clark-Schwebel putting Textura on cash terms and billing it for all goods being held but with Burlington continuing to offer credit and to warehouse Textura's goods at no cost to petitioner. These and similar facts led the Court to conclude (Pet. App. A, p. 3355):

> Far from indicating any conspiracy to pursue common credit policies designed to drive Textura out of business, the picture is just the opposite, with one creditor (Clark-Schwebel) adopting a Procrustean policy, while the other (Burlington) sought through leniency to capture some of the business being given up by the first.

tura did not pay its bills within 60 days of the date of invoice as promised (*see* PX 91) and on January 5, 1966 (at least two months before the conspiracy allegedly began) Burlington independently decided to seek a renewal of Powrie's personal guarantee for 1966 (Pet. App. A, p. 3342).

Furthermore, as the Court noted (Pet. App. A, p. 3350), while the conspiracy allegedly began on March 1, 1966 when Clark-Schwebel placed Textura on a cash basis, Burlington did not even learn of this action until June 8, 1966. Prior to learning of this action, Burlington independently continued its efforts to obtain Powrie's personal guarantee in light of Textura's "horrible" financial results in 1965 (DX BE; BF; BH; BK; PX 60).[11] When those efforts were unsuccessful, Burlington in April and May of 1966 (again, before learning of Clark-Schwebel's actions) independently delayed approval of new orders placed by Textura (Pet. App. A, pp. 3349-50). *See also* DX AO, DX BL, DX BM.[12]

[11] Despite petitioner's present belated attempt to characterize the loss of over $113,000 in 1964 as "a planned loss," and the further loss of about $30,000 in 1965 as the result of "consolidation" (Petition, p. 10), by Powrie's own admission the financial losses in these two years were "staggering" and "horrible," respectively. It strains credulity for petitioner to suggest that these losses actually demonstrated "rosy financial prospects" for Textura (Petition, p. 10).

[12] The Court below noted that Textura relied heavily—as it does now—on the delay in approval of these new orders as an inference of conspiracy, but the Court held that Burlington's lack of knowledge of Clark-Schwebel's action, as well as "later events [including approval of these very orders] negates it" (Pet. App., pp. 3349-50).

After Burlington learned on June 8, 1966, that Clark-Schwebel had placed Textura on a cash basis and was contemplating an arbitration proceeding—which Textura has always admitted would be a matter of natural and legitimate concern to its creditors (Tr. 663-65, 1072-73, 1109-11)—Burlington nevertheless continued to extend credit to Textura, although it insisted that Textura try to keep its prior promise of April, 1965, of making payment within 60 days of the date of invoice (DX BO, BP, BS). In August, 1966, Burlington's credit department approved all new orders placed by Textura (PX 548), and decided to continue extending an open line of credit to petitioner for the rest of the year, provided Textura complied with Burlington's year-old policy of payment within 60 days of the date of invoice (PX 548). In November 1966, Burlington decided to extend credit approval on new orders running into 1967 (DX BS).

On the basis of this undisputed evidence, the Court of Appeals correctly concluded that the credit actions taken by Burlington were the result of a policy independently formulated by Burlington in 1965, one year prior to the start of the alleged conspiracy (Pet. App. A, p. 3353), and were the result of Burlington's own independent judgment, not the product of any conspiracy with Clark-Schwebel. Moreover, the Court recognized—and Textura has never been able to refute the fact—that Burlington's actions were entirely consistent with its independent self-interest, since Textura suffered "horrible" financial results in 1965 and in mid-1966 was faced with a sizable arbitration proceeding with Clark-Schwebel, which, as the Court said, very well "could be the final blow collapsing Textura's admittedly thin financial structure" (Pet. App. A, pp.

3353-54). The Court of Appeals stated (Pet. App. A, p. 3354):

> The only conclusion that can be drawn is that it was reasonable for Burlington, in its own self-interest as a creditor, to worry about the arbitration, and to ask for a guarantee as a step to protect itself against Textura's possible bankruptcy. [citation omitted.] Even assuming that the Burlington request for a guarantee could be considered parallel with Clark-Schwebel's earlier cut-off of credit that step, being in Burlington's individual economic interest, could not without more, raise an inference of conspiracy [citations omitted].

The Court held that the other evidence relied upon by petitioner could not alter this conclusion.

B. The Alleged Refusals to Deliver Fabrics

The Court of Appeals explicitly "confronted" Textura's claim that respondents withheld or delayed the delivery of fabrics to Textura as part of the alleged conspiracy (Pet. App., pp. 3335, 3346-51). It concluded, however, that undisputed facts on this issue rebutted petitioner's claimed inference and, indeed, directly contradicted the existence of any conspiracy (Pet. App. 3351).

Thus, as noted by the Court, during the heart of the "conspiracy" period when Burlington allegedly was trying to force Textura to settle its arbitration dispute with Clark-Schwebel, it was shipping goods to Textura in *record* quantities (Pet. App. A, pp. 3348-49). Only in August, 1966, *after* the arbitration between Clark-Schwebel and Textura was settled, did Burlington's shipments to Textura decline, and this decline, the

Court held (Pet. App. A, p. 3350), was the result of credit actions independently taken by Burlington in April and May 1966, *prior* to learning of Textura's dispute with Clark-Schwebel, when Powrie was "stalling" on renewing his personal guarantee to Burlington.[13] *See also* DX BH, BK, BL, BM; PX 60, 123. Moreover, even these temporarily delayed contracts were subsequently approved by Burlington's *credit* department in August, 1966, and, indeed, many of the fabrics were already in inventory by that date (PX 548) since the sales department had started weaving them at its own risk without credit approval (DX BN). *See* Pet. App. A, pp. 3350 and n.10.

As the Court of Appeals noted, there was a "radical difference between Clark-Schwebel's and Burlington's treatment of Textura during the alleged conspiracy" (Pet. App. A, pp. 3346-47) with regard to the shipment of fabrics to Textura. While Clark-Schwebel "drastically cut its sales to Textura as a result of its dispute with that company" (Pet. App. A, p. 3347), Burlington's shipments to Textura "increased substantially" over the previous year's figures (Pet. App. A, p. 3348).[14]

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[13] The Court thus completely answered petitioner's present contention (Pet. 21-22) that the lack of shipments in August and September was the result of conspiracy and were planned to coincide with Clark-Schwebel's March, 1966 actions.

[14] As the Court observed (Pet. App. A, pp. 3347-48):

> Had Burlington and Clark-Schwebel been conspiring to coerce Textura into accepting Clark-Schwebel's demands, one would expect Burlington's shipments to be reduced similarly, thereby increasing the pressure on Textura to settle its dispute with Clark-Schwebel on terms unfavorable to Textura. However, on the contrary, Burlington's shipments to Textura increased substantially during this period over comparable 1965 figures.

Based on petitioner's own evidence reflecting fabric shipments to Textura by Burlington, the Court was unequivocal in its conclusion (Pet. App. A, p. 3351):

> In sum, the record of the 1966 shipments by Burlington and Clark-Schwebel to Textura not only fails to support the claim of conspiracy but points in the opposite direction. The two companies followed wholly different policies in their sales of fabrics to Textura. Burlington had developed its policy long prior to the period of the alleged conspiracy and did nothing to change it in response to Clark-Schwebel's switch to a harder line. Indeed, Burlington's large shipments in the spring and summer would tend to undercut Clark-Schwebel's position.

C. The Alleged Refusals to Weave New Fabrics

Contrary to petitioner's present contentions, the Court of Appeals clearly understood that Textura was claiming a refusal to weave new fabrics as evidence of Burlington's participation in a conspiracy. It held, however, that the evidence not only did not support the contention that Burlington conspiratorially refused to weave new fabrics but that Burlington's action in this regard "was the antithesis of conspiratorial conduct" (Pet. App. A, p. 3351).

The Court referred to the facts that on May 11, 1966, during the middle of the alleged conspiracy, Textura placed an order with Burlington for a fabric style ("Homespun") formerly woven exclusively for Textura by Clark-Schwebel and that Burlington in fact wove 25,000 yards of the fabric (*id.*). Petitioner carefully avoids any reference to this transaction, so anti-

thetical to the existence of an agreement between respondents to refuse to weave new fabrics.[15]

Also contradicting any claim of conspiracy, as the Court of Appeals held, was Burlington's entire course of conduct respecting the acceptance of new orders. *See* Pet. App. A, p. 3350. After Burlington removed the independently established credit "hold" on certain orders while Powrie "stalled" on renewing the guarantee, Burlington reviewed Textura's fabric requirements with Powrie and proceeded to weave all the fabrics requested (Pet. App. A, pp. 3350-51). In fact, by November 1966, Burlington had in inventory 71,500 yards of fabric specially woven for Textura, and was in the process of weaving 11,000 additional yards (DX BS). When Textura went out of business, Burlington had in inventory about 85,000 yards of fabric specially woven for Textura (PX 884).[16]

As the Court of Appeals concluded, all of this evidence, since it showed that Burlington *did* accept and weave new fabrics during the heart of the alleged conspiracy, totally refutes Textura's claim that Burlington conspiratorially refused to accept new orders for Textura.

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[15] Burlington also wove a sample of another Textura fabric ("Morro") formerly woven exclusively by Clark-Schwebel but, as the Court of Appeals pointed out, "Mr. Powrie testified that 'Morro kind of faded out of the picture' (Tr. 375), which is the only conclusion the evidence supports on the fate of this order" (Pet. App. A, p. 3351, n.11).

[16] Petitioner now implies that Burlington was weaving these fabrics for another alleged co-conspirator, Soft-Flex Fabrics, Inc., (Pet. 16), which, according to petitioner's speculation, was to take over when Textura was destroyed. The trial court ruled, however, that there was no evidence whatever showing that Soft-Flex or its principals were involved in any way in any conspiracy with defendants (Tr. 1883).

D. The Alleged Deliveries of Defective Merchandise

The Court of Appeals also "confronted," and rejected, Textura's claim that Burlington delivered defective fabrics to Textura as part of the conspiracy. As the Court concluded (Pet. App. A, p. 3352), it is undisputed that in each and every instance in which Textura complained of quality problems Burlington made an adjustment which was fully satisfactory to Textura. Thus, said the Court (*id.*):

> Burlington's . . . attitude on quality complaints by Textura again stands in sharp contrast to Clark-Schwebel's position. While Clark-Schwebel's refusal to make what Textura deemed adequate adjustments of its quality complaints was a major factor precipitating the dispute between those two companies, Powrie testified that Burlington had been consistently more reasonable in making adjustments for defective fabrics. . . . [B]y Powrie's own testimony, Burlington offered him satisfactory quality adjustments on various fabrics as late as December of 1966.

With respect to Textura's theory that as part of the "conspiracy" Burlington deliberately wove a former Clark-Schwebel fabric ("Homespun") in a defective manner, the Court of Appeals held (Pet. App. A, pp. 3351-52):

> While we must give the plaintiff the benefit of every reasonable inference, this argument leaps from inference into unbounded speculation, particularly in view of the fact that, when the quality problem with "Homespun" became evident, Burlington did not attempt to force the inferior fabric on Textura or otherwise use the contract as a tool to harass that company. Rather, it agreed to void the contract or, alternatively, to sell the fabric to Textura at a closeout price. . . . The only reason-

able inference which can be drawn from this episode is that Burlington was not conspiring with Clark-Schwebel. . . .

In sum, all of the actions relied upon as similar or parallel and supporting inferences of conspiracy were in fact not similar at all and can provide no support for the verdict. The Court below concluded (Pet. App. A, pp. 3345-46) (emphasis added):

> The dissimilarity between the conduct of the two defendants in their dealings with Textura extended to such basic matters as their willingness to ship goods on credit to Textura, the credit policy terms of each toward Textura, and the adjustment of quality claims. The evidence with respect to these matters not only fails to provide any basis for a finding of conspiracy, *it reveals conduct that is diametrically opposed to and inconsistent with any such combination or agreement....* Given this failure to show evidence probative of a conspiracy, the verdict cannot stand.

Finally, as we next show, this conclusion cannot be overturned by petitioner's speculations concerning respondents' alleged motives for driving Textura out of business.

E. The Purported Motive for the Conspiracy

The Court of Appeals stated that "[w]e have carefully reviewed the other evidence [including alleged motive] advanced at trial in support of the conspiracy claim, and find it cannot fairly be viewed as raising an inference of conspiracy" (Pet. App. A, p. 3358). The Court ruled that no significance could be attached either to an isolated statement by a Burlington employee *two years before the conspiracy* that he would rather not do business with Textura or to a series of "complaints"

received by Burlington over the years from other fabric customers concerning the way Textura did business. Any possible inference in these isolated preconspiracy matters, the Court held, was fully rebutted by the fact that Burlington *did* continue to do business with Textura up until the time of petitioner's bankruptcy[17] (Pet. App. A, p. 3358).

Similarly, while the alleged "complaints" were of long standing, it is undisputed that Burlington never took any action against Textura.[18] As the Court of Appeals held (Pet. App. A, p. 3359):

> . . . Burlington had continued to deal with Textura for years. The suggestion that [the complaints] suddenly provided a motive for Burlington to destroy Textura in 1966 thus ranks as utter specu-

[17] With respect to the so-called "complaints," we note (as did the Court of Appeals) that Textura offered proof that its business was unique and that it had displaced not other fabric merchants but venetian blind dealers. *See* Pet. App. A, p. 3358, n.17.

[18] Petitioner persists in flatly misrepresenting that Mr. Vollers of Burlington's sales department testified that his superior told him to "do something about Textura" (Pet. 12). This is a direct quotation, *not from the testimony of the witness,* but from the closing argument of Textura's counsel (Tr. 2265). In fact, Mr. Vollers said no such thing. *See* Tr. 1826-30.

Also inaccurate are petitioner's representations concerning the termination of Textura's factoring agreement by its factor, L. F. Dommerich & Co. (Petition, pp. 15-16). There is no evidence of record as to why Dommerich cancelled its agreement with Textura, although, as the Court of Appeals noted, respondents would have introduced evidence to demonstrate an *independent* termination by Dommerich had the trial court not ruled the Dommerich question out of the case (Pet. App. A, p. 3343). See Tr. 1744-45, 1808-09. As the trial judge observed, there was no proof that Dommerich was involved in any conspiracy, and as the Court of Appeals said, "there is no evidence that the [respondents] were involved in [Dommerich's] decision [to terminate]" (Pet. App. A, p. 3343).

> lation . . . especially since Burlington made no effort to coerce Textura into stopping the marketing methods which allegedly gave rise to the complaints.

We submit that these and the other rulings of the Court of Appeals are correct in every respect. The proof shows that at all times Burlington acted independently in the exercise of its own business judgment and made no agreement with anyone concerning whether or in what amount or on what terms it would do business with Textura. The factual issues raised by petitioner are of the type that this Court regularly has refused to consider.[19]

II.

THE COURT OF APPEALS ACTED WITHIN ITS CONSTITUTIONAL AND STATUTORY AUTHORITY IN SETTING ASIDE THE UNSUPPORTED VERDICT

We have demonstrated above that this case involves merely factual issues of interest only to the parties involved. In a transparent attempt to disguise this fact and to capture the attention of this Court, petitioner

[19] *See, e.g.*, Hallmark Industry v. Reynolds Metals Co., 489 F.2d 8 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974) (affirming judgment n.o.v. for defendants); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) (reversing judgment on jury verdict and directing entry of judgment n.o.v. for defendants); Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963) (affirming directed verdict for defendants); Clark v. United Bank of Denver, N.A., 480 F.2d 235 (10th Cir.), *cert. denied*, 414 U.S. 1004 (1973) (affirming summary judgment for defendants); Delaware Valley Marine Supply Co. v. American Tobacco Co., 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962) (affirming directed verdict for defendants). *See also* Modern Home Institute, Inc. v. Hartford Accident & Indem. Co., 513 F.2d 102 (2d Cir. 1975).

urges that the Constitution is transgressed when a Court of Appeals upsets a jury verdict in which the trial judge in ruling on post-trial motions has specifically concurred. Petitioner asks this Court to adopt the following rule of law: "When a jury verdict is explicitly concurred in and approved by the trial judge, it will not be reversed on appeal on the sole ground that the facts do not sustain the verdict" (Petition, p. 26).[20]

In the first place, the principle espoused by petitioner is not even raised by the present case and adoption of the proposed rule would be pure dictum because the verdict was *not* set aside solely on the ground that it was not sustained by the evidence. To the contrary, as the Court of Appeals made clear (Pet. App. A, p. 3346) (emphasis added): "The evidence . . . not only fails to provide any basis for a finding of conspiracy, *it reveals conduct that is diametrically opposed to and inconsistent with any such combination or agreement.*" Thus, the verdict was flatly contrary to the undisputed evidence, not merely unsupported by petitioner's proof.

[20] Petitioner repeatedly asserts that in the instant case the jury's verdict was "wholly, explicitly and strongly approved" by the trial judge (*e.g.*, Petition, pp. 2, 3, 4, 24). Petitioner overlooks the facts, however, that (1) the jury's verdict was returned only after obvious confusion during more than four days of deliberation, in which it made numerous requests for clarification and guidance; (2) the trial judge, due to a personal emergency, was not available to answer the jury's questions and a substitute judge purported to provide the requested guidance (see Tr. 2392-2447); and (3) the trial judge did not "wholly, explicitly and strongly" approve the jury's verdict, but rather dealt cursorily with the verdict in only two paragraphs of a "Memorandum Order" (Pet. App. B, p. 2), failed to discuss any of the evidence of record, and did not cite a single case in support of the decision.

Moreover, the proposed rule is simply wrong on its face since it would have the effect of denying appellate review in all cases where the trial judge compounds the error of an unsupported verdict by agreeing with it.

Where, as here, a trial judge errs in denying motions for a directed verdict or for judgment notwithstanding the verdict, the Court of Appeals is empowered—indeed, is obligated—to reverse the error of the trial court. In such instances, it is well-established, the Seventh Amendment poses no obstacle to reversal on appeal. As this Court held in *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 322 (1967):

> As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v.* *See Baltimore & Carolina Line, Inc.* v. *Redman* [295 U.S. 654 (1935)]. Likewise, the statutory grant of appellate jurisdiction to the Courts of Appeals is certainly broad enough to include the power to direct entry of judgment *n.o.v.* on appeal. [Citing 28 U.S.C. §2106.]

See also, Montgomery Ward & Co. v. *Duncan,* 311 U.S. 243, 254 (1940); *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654 (1935); 5 Moore's Federal Practice ¶ 38.05(5), at 89-90 (1976).

Petitioner requests nothing less than total abrogation of the right to appellate review in cases like the present one; it vaguely promises in return nothing more than an unclogging of some appellate calendars. See Petition, p. 26. Petitioner raises a specious issue for which not a single precedent is cited. The Court

should reject this obvious attempt to impart substance where none exists.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 10, 1976

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

NO. 76-132

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS, *Petitioner*,

vs.

CLARK-SCHWEBEL FIBERGLASS CORPORATION and BURLINGTON INDUSTRIES, INC., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

SIMPLIFIED STATEMENT OF THE ULTIMATE PROBLEM INVOLVED

Petitioner stated the Questions Presented for review with an attempted nice regard for each of the legal principles which calls for condemnation of the departure by the Court of Appeals from our historic limitations on appellate procedure.

This resulted in six Questions Presented.

While respondents' motives for condensation are psychologically understandable, petitioner adheres to his formulation which invites attention to all of the legal predicates for exercise of this Court's power of supervision. But the ultimate, underlying problem may be more briefly stated:

> Will our appellate courts resume their historic, Common Law role of deciding questions of law and general matters of judicial administration? Or will they continue their disastrous plunge into the trial arena, becoming little more than surrogate jurors, administrative agencies, legislative committees, referees, and Boards of County Commissioners, performing inexpertly (because they are situated to deal only with paper records and not living realities) the functions intended for and better performed by others?[1]

RESPONDENTS' CASES DO NOT MEET PETITIONER'S THRUST

Neely v. Eby Construction Co., 386 U.S. 317 (1967), heavily relied on by both respondents (Clark-Schwebel brief, pp. 2, 12; Burlington brief, p. 24), could be of comfort to them only on the basis of superficial analysis. That case, concerned essentially with the mechanics of the then newly-amended and supplemented FRCP 50, must be read against the background of this Court's historic delineation of Seventh Amendment restrictions on appellate review of jury verdicts, in such cases as ***Slocum v. New York Life Ins. Co.***, 228 U.S. 364 (1913), ***Baltimore & Caroline Line v. Redman***, 295 U.S. 654 (1935) and ***Johnson v. New York, N.H. & H. Railroad Co.***, 344 U.S. 48 (1952).

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[1] Although seemingly of minor significance, petitioner regrets the error of assigning John Wilson to Burlington rather than Stevens. See Petition p. 12; Clark-Schwebel brief, p. 17; Burlington brief, p. 4.

This is not the time to enter into factual interpretations or to confront the misstatements in both of respondents' briefs.

In ***Neely***, the Court was careful to close its opinion by noting that "Petitioner's case in this Court is pitched on the total lack of power in the Court of Appeals to direct entry of judgment for respondent." (386 U.S. at 330). The instant petitioner's case is not so pitched. To the contrary, it is pitched not on lack of power but on the current need for refinement of restrictions on appellate interference with trial court autonomy, to the end that appellate power will remain operable and will not be so frequently and egregiously abused as it was below.

Factually, too, ***Neely*** and the instant case are worlds apart:

In ***Neely*** there is no indication that the trial judge did more than deny the j.n.o.v. motion. Here, he affirmatively, explicitly and strongly approved the jury's **special** and **detailed** verdict.[2]

WHY FACTUAL ISSUES ARE FOR TRIAL COURTS

The words of Mr. Justice Black in ***Neely***, in the light of today's appellate realities, assume a prophetic as well as historic significance. For in discussing the necessity of a new trial after a verdict is set aside, he had occasion sharply to expose why factual issues are for trial courts:

> It is a factual issue and that the trial court is the more appropriate tribunal to determine it has been almost universally accepted by both federal and state courts

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[2] Similarly, the other cases invoked along with *Neely*, *United States v. Generes*, 405 U.S. 93 (1972), *First Nat. Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) and *New York, N.H. & H.R.R. Co. v. Henagan*, 364 U.S. 441 (1960), do not control.

Generes involved the legal distinction between "dominant motivation" and "significant motivation" for purposes of tax-law classification of a bad debt, the kind of legal question for the resolution of which appellate courts sit.

The *First Nat. Bank of Arizona* case, wherein summary judgment was involved, not jury trial, was one of ***agreement*** with the trial court by the Court of Appeals and this Court. In none of the cases involving appellate

throughout the years. There are many reasons for this.

Appellate tribunals are not equipped to try factual issues as trial courts are.

A trial judge who has heard the evidence in the original case has a vast store of information and knowledge about it that the appellate court cannot get from a cold printed record.

Thus, as we said in ***Cone***, the trial judge can base the broad discretion granted him in determining factual issues of a new trial on his own knowledge of the evidence and the issues "in a perspective peculiarly available to him alone." 330 U.S., at 216.

The special suitability of having a trial judge decide the issue of a new trial in cases like this is emphasized by a long and unbroken line of decisions of this court holding that the exercise of discretion by trial judges in granting or refusing new trials on factual grounds is practically unreviewable by appellate courts. * * * (386 U.S. at 337-38; Spacing supplied for emphasis).

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displacement of a jury verdict does it appear that the trial court had affirmatively, strongly and explicitly approved the verdict, as here.

Compare the action of the instant trial court:

"Plaintiff has clearly demonstrated in his brief in opposition to the motions that there was sufficient evidence to support the jury's findings of a conspiracy and the Court is in complete agreement with that conclusion.

"There was sufficient evidence from which the jury could have reasonably found that Burlington and Clark-Schwebel took similar actions to restrict the credit terms on which they previously sold fiber glass fabrics to Textura and to restrict the availability of marketable fiber glass fabrics to it, all at a time when these defendants were in constant communication with each other, and that they knew that their joint actions would drive Textura out of business." (App. B, p. 2)

THE THREAT OF ONE JUDGE AND NO JUDGE APPELLATE DECISIONS

How can our Courts of Appeals, with today's burgeoning calendars, be expected, or permitted, essentially to try cases de novo (although on cold records), where transcripts of thousands of pages are more the rule than the exception?

They can't personally and satisfactorily perform such feats; and it is a flight from reality to indulge the assumption that they do.

No wonder that this unnatural overload of fact-finding is passed on to law clerks, who become virtual one-person, substitute, non-constitutional jurors. Our Common Law system is threatened with disintegration, or at best, transformation into something like the Civil Law pattern, without any of the advantages of the latter. This will produce more and more "one judge and no judge" appellate decisions as a matter of routine. Some of our appellate courts are now alarmingly close to this point, if indeed they have not already reached it. See the article of Mr. Justice Thompson of the California Court of Appeal, ***One Judge and No Judge Appellate Decisions***, 50 California State Bar Journal 416 (Nov./Dec. 1975).

THE PROPOSED RULE WOULD AFFORD APPELLATE COURTS AND THE PUBLIC SUBSTANTIAL RELIEF

Petitioner's suggestion offers appellate courts some surcease from the rolling flood of fact-finding chores, with resulting increased opportunity better to perform their true appellate functions. It offers the public significant relief from such deplorable miscarriages of justice as occurred below.

NOT A RADICAL INNOVATION

It is not a radical innovation. It is essentially a refinement of historic Seventh Amendment and other requirements of decent

appellate review, revitalized and particularized in the light of current exigencies, as pointed out in the petition for certiorari.

THIS COURT'S SEVERAL ALTERNATIVES

It would seem that this Court has several alternatives in expressing the rule through this case:

(1) It may limit it only to antitrust cases. Cf. ***United States v. Patten***, 226 U.S. 525, 544 (1913); ***Continental Ore Co. v. Union Carbide Corp.***, 370 U.S. 690, 699 (1962). If Courts of Appeals can continue arbitrarily to set aside special jury verdicts specifically approved by the trial judge on factual grounds alone (as in this case), the antitrust laws will soon become no more than hollow shells;

(2) It may limit it to cases that turn on design, motive and intent (as does this case). Cf. ***United States v. Yellow Cab Co.***, 338 U.S. 338, 341 (1949); or

(3) It may apply it to all appeals in an effort to return the appellate function to its proper historic, Common Law role of deciding questions of law and matters of judicial administration, as distinguished from finding the facts. See generally Wright, ***The Doubtful Omniscience of Appellate Courts***, 41 Minn. L. Rev. 751 (1957).

CONCLUSION

The questions of public interest presented by this case are basic, broad, and highly important. They arise in an antitrust factual context that cries out for redress of injustice.

This petition for a Writ of Certiorari should be granted.

Dated September 20, 1976.

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